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Airborne Freight Corp. and Kevin Tanski and Teamsters Union Local 407 a/w International Brotherhood of Teamsters, AFL-CIO and Michael E. Shuba and Robert Hearn and Jon J. Krokey and Jon Mauer and Wilma J. Conley. Cases 8-CA-28047, 8-CA-28113, 8-CA-28893, 8-CA-28961, 8-CA-29178, 8-CA-29636, 8-CA-29357, 8-CA-29610, 8-CA-29713, and 8-CA-29842

November 19, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 23, 1999, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief; and the General Counsel filed exceptions and a supporting brief.¹ The Respondent and the General Counsel each filed answering briefs and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,² and conclusions except as indicated below, and to adopt the recommended Order as modified.³

A. Background

This proceeding involves alleged unfair labor practices occurring between late 1995 and early 1998 at the Respondent's Beachwood and Middleburg Heights, Ohio facilities. At all relevant times, Teamsters Local 407 has represented the employees at these facilities. The alleged discriminatees primarily are current or former stewards and alternate stewards, as well as some other employees who had attempted to enforce the terms of the collective-bargaining agreement. As detailed in the judge's deci-

¹ No exceptions were filed to the judge's findings on complaint pars. 6(C),(D),(F),(G),(J),(K),(L),(M),(O); 9 10(D),(E),(J),(L),(P),(Q),(S),(T),(V),(DD),(GG),(HH),(LL); and 13(A).

² The parties have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America*, 337 NLRB 175 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004).

sion, many of the confrontations between the Respondent and the alleged discriminatees arose from certain management personnel changes at these locations and the participants' response to the changes.

A major focus of the alleged unfair labor practices in this proceeding is on discipline directed at Robert Hearn, who had been a union steward first at Middleburg Heights and then at Beachwood until 1995. The General Counsel's complaint includes allegations that Hearn was unlawfully discharged on four occasions between January 1996 and January 1998.⁴ Under the terms of the parties' collective-bargaining agreement, an employee contesting a discharge in most cases remained on the job until the grievance was resolved. In addition, the record shows that some of Hearn's discharges were either set aside or reduced to suspensions based on determinations made by a "grievance panel" or by the Ohio Joint State Grievance Committee.

At issue in this case, inter alia, is whether the Board should defer to these grievance determinations.⁵ Where a threshold issue is raised as to whether the Board should defer to an award issued by such joint grievance committees, it is settled that the standard to be used in considering the deferral request is identical to that generally applicable to deferral to arbitration awards under *Spielberg Mfg. Corp.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). See *Carolina Freight Carriers*, 281 NLRB 440, 442 (1986).

B. Robert Hearn

1. January 29 and February 6, 1996 discharges

As described fully in the judge's decision and discussed further herein, this case involves the lengthy disciplinary history of employee Hearn, including four separate discharges and other disciplinary actions. The first two discharges, on January 29 and February 6, 1996, were combined, in part, for presentation to a joint state grievance panel.

Specifically, the Respondent discharged Hearn on January 29 for a single disciplinary offense, i.e., using a vulgarity to describe a supervisor during a conversation with another supervisor. For Hearn's February 6 discharge, the Respondent relied on two separate disciplinary bases: first, the "cardinal offense" of allegedly failing to report an accident, i.e., an offense warranting immediate removal from work; and second, his overall work record. Hearn's grievance over the "cardinal of-

⁴ As detailed below, these discharges occurred on January 29 and February 6, 1996; July 1, 1997; and January 20, 1998.

⁵ We agree with the judge, for the reasons he stated, that: (a) *Spielberg/Olin* deferral is not appropriate with respect to the Respondent's refusal to hire Kevin Tanski; and (b) that refusal was unlawful.

fense” basis for the February 6 discharge (failure to report an accident) was considered by a joint state grievance panel soon after February 6. The grievance panel sustained Hearn’s grievance over his discharge on this basis and ordered his immediate reinstatement with back-pay. The “overall work record” basis for Hearn’s February 6 discharge was separated from the “cardinal offense” basis and combined with the January 29 discharge for a hearing before a joint state grievance panel on May 15, 1997. The joint state grievance panel reduced the discharges of January 29 and February 6 (overall work record) to a 5-day suspension. In sum, grievances over both the January 29 and February 6 discharges were resolved by resort to the parties’ contractual grievance-arbitration agreement.

Under *Spielberg Mfg. Corp.*, supra, and *Olin Corp.*, supra, the burden of proof is on the party—here the General Counsel—who opposes deferral to the arbitration award.⁶ One way in which the General Counsel can meet this burden is by showing that the arbitrator did not adequately consider issues relevant to the Act. *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988), enfd. mem. 862 F.2d 304 (2d Cir. 1988); *Martin Redi-Mix, Inc.*, 274 NLRB 559, 560 (1985).

The record in this case reveals the result of the May 15, 1997 grievance hearing regarding Hearn’s January 29 and February 6 (overall work record) discharges; however, it does not show what arguments and evidence were presented by the parties in that proceeding. Therefore, we find that the General Counsel failed to prove that issues relevant to the Act were not presented to the grievance panel and that deferral pursuant to the *Spielberg/Olin* standard is inappropriate. Moreover, the judge stated no alternative basis for denying the deferral defense, and the General Counsel has provided no other basis for not deferring to the joint committee’s resolution. Accordingly, we dismiss the complaint allegations as they pertain to the January 29 and February 6 (overall work record) discharges.⁷ Similarly, the General Counsel has not shown that deferral is inappropriate for the

separate grievance panel determination regarding Hearn’s alleged failure to report an accident, which was the Respondent’s other ground for Hearn’s discharge on February 6.⁸

Consequently, we will defer to the decisions of the joint state grievance boards resolving Hearn’s grievances over his January 29 and February 6, 1997 discharges, and we will dismiss the complaint allegations.

2. Supervisor Mitchell’s statement

Arguing that there was no complaint allegation to this effect, the Respondent excepts to the judge’s finding that it violated Section 8(a)(4) on January 4, 1997, when Supervisor John Mitchell told Hearn that he was not being allowed to transfer to a different delivery route because he had filed unfair labor practice charges with the Board. The complaint alleged that the statement violated Section 8(a)(1), and at the hearing Mitchell admitted having made the statement. The judge found, in addition, that the Respondent did in fact prevent Hearn from changing his route, in violation of Section 8(a)(3), as also alleged in the complaint.

Mitchell’s statement demonstrated that, in preventing Hearn from changing routes, the Respondent was motivated not only by Hearn’s union activity but by his having filed Board charges. Consequently, the statement violated Section 8(a)(1) as alleged. We also agree with the judge’s finding of a violation of Section 8(a)(4). The parties litigated the facts material to Section 8(a)(4) thoroughly and without objection in connection with the 8(a)(3) violation. The judge’s discussion of Section 8(a)(4), although focused on Mitchell’s statement, clearly covered the Respondent’s discriminatory actions. We therefore find that the judge did not exceed his discretion in finding a violation of Section 8(a)(4), as to the statement, even absent a specific complaint allegation.⁹ See, e.g., *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).¹⁰ And, we find that the refusal to allow transfer was unlawful under Section 8(a)(3) and (4).

3. The 5-day suspension

The judge found that Hearn’s 5-day suspension by the joint grievance committee, pursuant to the committee’s

⁶ The Board finds deferral appropriate where (1) the arbitration proceedings are fair and regular; (2) all parties have agreed to be bound; (3) the arbitral decision is not clearly repugnant to the Act; (4) the contractual issue before the arbitrator is factually parallel to the unfair labor practice issue; and (5) the arbitrator has been presented generally with the facts relevant to resolve any unfair labor practice. *Laborers Local 294*, 331 NLRB 259, 260 (2000). As the third criterion indicates, the arbitrator’s ultimate disposition of the grievance does not become relevant unless it is “clearly repugnant to the Act.”

⁷ In light of our deferral to the decision of the joint state grievance panel and dismissal of the complaint allegation regarding the January 29 discharge, we find permissible the grievance panel’s reliance on that discharge in resolving the grievance and determining the disciplinary penalty for the February 6 discharge.

⁸ The Board’s deferral principles are applicable without regard to whether the award in the grievance proceeding is favorable or unfavorable to the grievant. See, for example, *Laborers Local 294 (AGC of California)*, 331 NLRB 259, 261 (2000).

⁹ Chairman Battista finds it unnecessary to pass on the 8(a)(4) issue, as it would not affect the remedy.

¹⁰ As a procedural matter, it would have been the better practice for the General Counsel to have amended the complaint at trial to include an 8(a)(4) allegation. However, the Respondent has made no showing of prejudice from her failure to do so.

May 15, 1997 proceeding, was unlawful. That suspension was based in part on, and was a reduction of, the January 29 discharge. Inasmuch as the judge found that discharge to be unlawful, he found the suspension to be unlawful. Because we have deferred as to the discharge under *Spielberg/Olin*, we will defer as to the suspension as well.

4. Written warning

We also find merit in the Respondent's exception to the judge's finding that it violated Section 8(a)(3) by giving Hearn's a written warning on June 12 for causing a preventable accident with a tow motor at the Respondent's facility on June 6, 1997. Hearn's received the warning after he collided with an I-beam while driving the tow motor. As the Respondent emphasizes, Hearn's had received a warning for a similar accident only a few weeks before, and he was given notice on that occasion that future accidents would subject him to more serious discipline, including possible suspension. In view of that earlier warning, we do not agree with the judge that Hearn's would not have been given the second warning absent his union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We therefore reverse this finding.

Our dissenting colleague assigns undue significance to the fact that Hearn's June 6 tow motor accident did not cause comparable monetary damage to that sustained in Hearn's prior accident. Hearn's disciplinary record clearly establishes that it was the repeat occurrence of a preventable industrial accident, for which he previously had been disciplined, that warranted Hearn's further discipline, not the monetary costs of such accidents. Moreover, Hearn's previous discipline carried a warning that further discipline would result from any additional preventable accident. In view of these circumstances, we find nothing suspect in the 1-day delay between the June 6 accident and the June 7 instruction to Hearn's to file an accident report, or in the further, short passage of time (including a weekend) before the issuance of the disciplinary notice for the June 6 accident.

5. The July 1, 1997 discharge

The judge found that Hearn's third discharge, on July 1, 1997, based on his work record for the preceding 9 months, did not violate Section 8(a)(3). This discharge, like Hearn's two previous discharges, was presented to the joint grievance committee;¹¹ but in this instance the judge did not discuss the question of whether *Spielberg/Olin* deferral was appropriate. We find, however,

that on this occasion he was correct in implicitly declining to defer.

Unlike the two earlier grievance hearings on Hearn's January 1 and February 6, 1996 discharges, the transcript for this grievance proceeding is in the record of the Board hearing. The transcript shows that at several points, Hearn's and his union advocate attempted to assert that Hearn's had been discharged in retaliation for filing Board charges and for raising contract issues. However, an employer member of the joint grievance committee repeatedly prevented them from making this argument and emphatically refused to consider it, without objection from any other committee panelist. This refusal to consider evidence or argument of antiunion motivation establishes that the joint grievance committee did not "adequately consider" that factor or permit Hearn's to "present generally" the facts relevant to the complaint allegation of 8(a)(3) discrimination, as required by *Olin*. See *ACF Industries*, 310 NLRB 115, 118-119 (1993); *ABF Freight System*, 304 NLRB 585, 587 fn. 5 (1991), enfd. 982 F.2d 441 (10th Cir. 1992); *Dick Gidron Cadillac*, 287 NLRB at 1111. Accordingly, deferral is not appropriate.

On the merits, however, we agree with the judge that Hearn's July 1, 1997 discharge was lawful. Although, as our dissenting colleague points out, the judge found that the Respondent unlawfully failed to notify Hearn's beforehand of the disciplinary hearing leading to the discharge decision, we view that procedural matter involving Hearn's rights under the contract as distinct from whether the Respondent made an unlawful decision to discharge him. The judge also found, and our dissenting colleague does not dispute, that no particular type of notice or procedure was required to initiate the disciplinary process that led to the discharge, and that the process itself was not discriminatory.¹²

Our colleague notes that the Respondent unlawfully sought to preclude a contractual grievance concerning the discharge. However, that does not establish that the discharge itself was an unfair labor practice. And, in this case, the Respondent has shown that the discharge was not an unfair labor practice, i.e., it was not motivated by Section 7 activity. To support the discharge, the Respondent relied, in part, on six disciplinary actions Hearn's received between February and June 1997. The judge found that these six disciplinary actions were unfair labor practices. Contrary to our dissenting colleague,

¹¹ The joint committee reduced this discharge to a 3-week suspension.

¹² Although the July 1, 1997 termination, based on Hearn's overall work record, was finalized after a disciplinary hearing, the record also indicates that Hearn's February 6, 1996 termination, also based on his overall work record, was implemented without the Respondent first conducting any hearing.

we have reversed the judge's finding as to two of these disciplinary actions (the May 20 suspension and the June 12 warning). Notwithstanding our finding that four of the disciplinary actions relied on by the Respondent were unlawful, we find that Hearn's remaining record of lawful discipline supports the judge's finding that the Respondent would have terminated Hearn's based on his disciplinary record during the relevant period, even had he not engaged in union activity.¹³ We also note that the record includes six additional valid disciplines during the relevant period of February-June. We believe that the Respondent, in weighing this misconduct, was not prohibited from considering other misconduct as background for deciding whether to impose the ultimate discipline, viz., discharge. In any event, even if the Respondent was so prohibited, we believe that the six incidents would have alone caused the discharge. We therefore adopt the judge's finding. *Wright Line*, supra.

6. January 20, 1998 discharge

The judge found that Hearn's fourth and final discharge, on January 20, 1998, again based on his work record, was lawful. This discharge was also presented the joint grievance committee and was upheld. Again, as

¹³ In finding unlawful Hearn's discharge of July 1997, as well as the January 1998 discharge discussed infra, our dissenting colleague contends that the judge improperly failed to allocate to the Respondent the burden of showing that it would have discharged Hearn's solely on the basis of lawfully disciplinary actions. We find, to the contrary, that the judge correctly applied the *Wright Line* standard and its shifting evidentiary burdens, and correctly concluded, based on evidence of Hearn's lengthy record of misconduct and the resulting lawful discipline (as well as additional discipline not alleged to be unlawful in the unfair labor practice complaint), that the Respondent would have discharged Hearn's pursuant to its established progressive disciplinary system, even in the absence of his union activity. Hearn's disciplinary history was lengthy, varied, serious, and sustained. We find insufficient evidence of pretext in the Respondent's reliance for Hearn's discharge on Hearn's impressive history of lawfully imposed discipline.

We further find that our dissenting colleague's reliance on *Network Dynamics Cables*, 341 NLRB No. 107, slip op. at 14 (2004), is misplaced, as that case is distinguishable. There, the Board summarily adopted the judge's finding that the discharge of an employee was unlawful because it was "based in large part" on several prior unlawful disciplinary actions, and the employer failed to demonstrate that the sole remaining lawful instance of discipline, alone, would have supported the employee's discharge. *Stemilt Growers, Inc.*, 336 NLRB 987, 990 (2001), also cited by our dissenting colleague for the contrary result, supports our decision here. There the Board found that the employer dismissed an employee for a single violent incident, where such violence was grounds, under the employer's policies, for immediate dismissal. Similarly consistent with our application of the *Wright Line* standard here are other cases relied on by our colleague: *Fitel/Lucent Technologies*, 326 NLRB 46, 52 (1998) (violation, where employer failed to establish that it would have discharged employee even in the absence of his union activities); *Ann's Laundry*, 268 NLRB 1013, 1016-1017 (1984) (violation, where employer's asserted reliance on disciplinary policy was pretextual).

with the July 1, 1997 discharge, the judge did not discuss the question of deferral.¹⁴ For the same reason explained in our discussion of that discharge, we find that deferral is unwarranted. The same employer panelist who had prevented Hearn's from presenting evidence of antiunion animus at the proceeding concerning his July 1, 1997 discharge again refused to consider that argument for the January 20, 1998 discharge.¹⁵ Accordingly, deferral would not be appropriate. *ACF Industries*, supra; *ABF Freight System*, supra; *Dick Gidron Cadillac*, supra.

On the merits, however, we agree with the judge that Hearn's discharge on this occasion was lawful. As found above, the January 20, 1998 discharge, like the previous discharge, was based on Hearn's overall work record, this time over the 7-month period after July 1, 1997. The judge found, and we agree, that the Respondent again showed that it would have discharged Hearn's because of seven legitimate warnings, and would have done so even had there not been the two other disciplinary actions during the period that were found to be unlawful. The totality of the evidence shows, as the judge observed, that Hearn's "often was caustic, intimidating, and profane" with management and drivers alike; was "a less than courteous and deferential driver, who happened to be the union steward"; had tardiness and performance problems; and, ultimately, "was his own worst enemy." Thus, unlike our dissenting colleague, we find that the discharge did not violate Section 8(a)(3).

C. Other Employees

1. Transfer of John Krokey

The charge of March 21, 1996, alleged that Krokey's route was unlawfully changed on January 1, 1996. The complaint alleged a change of route on or before October 28, 1995. Krokey testified that a change occurred about 3 months after August 1995, i.e., in November. The judge found that the change occurred in January 1996. We agree that this January change was within the scope of the charge of March 21, 1996. However, the problem is that the complaint alleges one date (on or before October 28, 1995), the employee testified as to another date (November 1995), and the judge found a third date (January 1996).¹⁶ In our view, the confusion as to dates

¹⁴ This discharge was reviewed by the joint grievance committee in a separate proceeding later on the same day that it reduced Hearn's earlier July 1, 1997 discharge to a 3-week suspension.

¹⁵ The Respondent characterizes the employer panelist's statements on this occasion as evidence that the joint committee "expressly rejected" Hearn's assertion that antiunion animus motivated his discharge. The panelist's "express rejection," however, was clearly of Hearn's attempt to make the assertion, not the assertion's merit.

¹⁶ The complaint alleged that this change continued after October 28. But, this is not the same as alleging that further changes occurred.

is so substantial as to make it fundamentally unfair to the Respondent to choose one of them and base a violation thereon.

2. Supervisor Mitchell's statement to Krokey

The General Counsel excepts to the judge's failure to rule on the complaint allegation that Supervisor Mitchell violated Section 8(a)(1) by telling Krokey, who was an alternate union steward, that he could not engage in union business on the dock or on company property. Although it is clear from the judge's decision that he credited Krokey's testimony that the incident occurred, he did not make a related finding that Mitchell's statement was unlawful. Krokey's testimony was not contradicted, and Mitchell testified only that he "couldn't remember" the incident. The judge also found, from Krokey's testimony, that the Respondent violated Section 8(a)(1) on a similar occasion, when Supervisor Stan Parulis told a group of drivers that they could talk to their steward only after their shift by calling him at home.¹⁷ We infer that the judge's failure to find Mitchell's statement unlawful was an oversight, and we grant this exception.

3. Discipline of Wilma Conley

The General Counsel also contends that the judge failed to rule on the complaint's allegations that the Respondent violated Section 8(a)(3) by taking a number of disciplinary actions against Wilma Conley between September 1997 and March 1998, including a 1-day and a 3-day suspension. The judge specifically found that the General Counsel had failed to establish that the Respondent took any action toward Conley as a result of antiunion animus. In finding that an essential element of the General Counsel's case with respect to Conley was missing, the judge implicitly recommended dismissal of the allegations of unlawful discrimination against her. *Wright Line*, supra. We see no basis for reversing that recommendation.¹⁸

4. Transfer of John Mauer

Finally, we find merit in the Respondent's exception to the judge's finding that it unlawfully transferred John Mauer to a more onerous route. In our view, the General

Counsel failed to make the required showing that the Respondent acted toward Mauer with antiunion animus. Unlike certain other active union members, whom the Respondent treated in an adversarial manner, there was virtually no such evidence as to Mauer. The only arguable basis for attributing antiunion animus against Mauer to the Respondent is the fact that Mauer's route was changed shortly after he complained to a supervisor that the supervisor was performing unit work. We do not find evidence of antiunion animus merely in the timing of the route change following Mauer's complaint about work assignments to supervisors. Issues regarding the identification and assignment of unit work are contractual matters. Disputes between the Respondent and the Union over the performance of work by supervisors were not unusual. We do not doubt that both sides had strong feelings about work assignment disputes. However, having strong feelings for or against a particular position in a contractual dispute is not the same thing as harboring antiunion animus.

As our dissenting colleague does not dispute, Mauer was not the only unit member transferred to a different route on that occasion, and the Respondent established that the transfers were made when an operational change at the relevant terminals required a systemic route adjustment. As the Respondent also points out, although Mauer was a relatively senior employee, the parties' collective-bargaining agreement did not correlate route assignments to seniority. For these reasons, we find that the General Counsel has failed to establish antiunion animus against Mauer, and that the Respondent, in any case, made a sufficient showing that Mauer's route would have been changed even had he not engaged in protected activity. The transfer was accordingly lawful. *Wright Line*, supra.

ORDER

The Respondent, Airborne Freight Corporation, Beechwood and Middleburg Heights, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discipline employees for filing grievances or engaging in union activities.

(b) Harassing employees for engaging in union activities by failing to notify them promptly in writing of disciplinary action taken against them.

(c) Harassing employees for engaging in union activities by telephoning them at home late at night.

(d) Interrogating employees about their union activities.

(e) Publicly ridiculing the Union or publicly ridiculing employees for engaging in union activities.

Consistent with our reading of the complaint, the General Counsel's exceptions and brief do not assert that the Board should find a violation of the Act with respect to any change to Krokey's route assignment in January 1996. Rather, the General Counsel asserts that an unlawful route change occurred in October, as the complaint alleges. In these circumstances, we conclude, as did the judge, that the complaint does not encompass the January 1996 route change.

¹⁷ The Respondent did not except to the judge's finding of the Parulis violation.

¹⁸ No exceptions were filed regarding the judge's decision not to defer to the grievance proceedings that addressed Conley's two suspensions.

(f) Prohibiting employees from conferring with their union stewards and alternate union stewards during non-working time in nonworking areas.

(g) Refusing and failing to hire Kevin Tanski as a regular part-time employee.

(h) Transferring employees to more onerous routes or otherwise reassigning them for engaging in union activities or other protected concerted activities.

(i) Requiring employees to complete special work assignments for engaging in union activities.

(j) Accelerating the bidding process to hinder employees in selecting their routes for engaging in union activities.

(k) Suspending employees for engaging in union activities.

(l) Otherwise disciplining employees for engaging in union activities or other protected concerted activities.

(m) Prohibiting employees from switching shifts for engaging in union activities.

(n) Refusing to allow employees to transfer to other routes for filing unfair labor practices charges with the National Labor Relations Board.

(o) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kevin Tanski a position as a regular part-time employee, if he has not already assumed such a position, with a seniority date of December 15, 1995.

(b) Make Kevin Tanski and Robert Hearn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Robert Hearn, John Root, and Michael Shuba and, within 3 days thereafter, notify these employees and former employee in writing that this has been done and that the discipline will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its terminals in Beechwood and Middleburg Heights, Ohio, copies of the attached notice marked "Appen-

dix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 19, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues, I would find the five unfair labor practices described below.

1. Warning to Robert Hearn

I would find that the Respondent violated Section 8(a)(3) by giving Robert Hearn a warning for causing a preventable accident with a tow motor on June 6, 1997. It is true that Hearn had received a warning for an earlier accident with a tow motor, and that he was told that future accidents would result in more severe discipline. But, as the judge found, the earlier accident caused \$1900 in damage, while the June 6 accident—in which Hearn brushed against an "I" beam—caused no damage. Indeed, Supervisor Stan Parulis, who was at the scene of the June 6 accident, did not consider the incident serious enough even to have Hearn fill out an accident report at the time. Hearn also was not given a warning until 6

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

days after the incident. The Respondent also failed to show that it had disciplined any other driver for an accident with a tow motor (as opposed to a motor vehicle). In these circumstances, I agree with the judge that the Respondent failed to show that Hearn would have been given the warning absent his union activities. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

2. July 1997 and January 1998 discharges of Hearn

I would find that the Respondent violated Section 8(a)(3) by discharging Hearn on July 1, 1997, and by discharging him on January 20, 1998. Neither my colleagues nor the Respondent dispute the judge's findings that these discharges were both based in part on previous unlawfully motivated disciplinary actions.¹ For this reason alone, the burden passed to the Respondent to show that on both occasions it would have discharged Hearn solely on the basis of the previous disciplinary actions that were lawful, and even if he had not engaged in union activity. *Network Dynamics Cables*, 341 NLRB No. 107, slip op. at 14 (2004); *Wright Line*, supra. However, with respect to both discharges, the judge failed to place this burden on the Respondent. Just because Hearn had been lawfully disciplined in the past does not show that he would have been discharged solely for those incidents if he had not been an active steward. To the contrary, the Respondent's admitted reliance on unlawful discipline as part of its review of Hearn's overall work record, casts substantial doubt on what the Respondent would have otherwise done. In my view, the Respondent has failed to meet its affirmative burden under *Wright Line* to justify these discharges.

a. The July 1997 discharge

With respect to the discharge on July 1, 1997, the Respondent based its decision at least in part on no fewer than six disciplinary actions that the judge found (and I agree) were unlawfully motivated. The judge found from additional credited evidence that the discharge itself was motivated by antiunion animus. Specifically, the judge found that "the Respondent deliberately failed to notify Hearn promptly in writing of the discharge *in order to prevent him from filing a timely grievance* [emphasis added]," thereby violating Section 8(a)(3). "Specifically," the judge found, "the manner in which the discharge hearing was spontaneously convened, the re-

luctance of [Supervisor] Mitchell to share any details about the meeting [in advance with Hearn], and the unexplained presence of William Kowal [a district manager from another site], Hearn's nemesis, calls [sic] into question *the true motivation for the hearing*." (Emphasis added.) The judge went on to find that in delaying Hearn's notice of his discharge "the Respondent intentionally treated Hearn differently than other employees *in an attempt to summarily discharge him for perceived union activity*." (Emphasis added.)

These findings by the judge—to which the Respondent has not excepted—negate the majority's effort to distinguish the unlawfully motivated failure to give Hearn timely notice of his discharge from the motive for the discharge itself.²

Nonetheless, after making these findings, the judge relieved the Respondent of its *Wright Line* burden, merely noting that Hearn had also received an unspecified number of lawful disciplinary warnings during the period at issue. From this fact alone, the judge summarily concluded that "under all the circumstances" the Respondent would have discharged Hearn even absent his union activity. *Wright Line*, however, requires the Respondent to show not only that a potentially valid basis for the discharge existed, but that the discharge was in fact motivated by that justification, and that Hearn would have been discharged solely on the basis of the lawful warnings he had incurred absent his union activity. E.g., *Stemilt Growers*, 336 NLRB 987, 990 (2001); *Fitel/Lucent Technologies*, 326 NLRB 46, 52 (1998); *Ann's Laundry & Dry Cleaners*, 268 NLRB 1013, 1016-1017 (1984); *Wright Line*, supra at 1089. The Respondent made no such showing.³ Accordingly, the discharge on July 1, 1997, clearly violated Section 8(a)(3).

b. The January 1998 discharge

With respect to Hearn's discharge on January 20, 1998, the judge and my colleagues similarly fail to apply

² Nor did the Respondent except to the judge's additional finding that Supervisor O'Connor, at Mitchell's instruction, violated Sec. 8(a)(1) by calling Hearn at home at midnight to inform him simultaneously that he had been discharged and that he had failed to file a timely grievance contesting the discharge, and therefore should not bother coming to work.

³ In this respect, the majority not only endorses but twice compounds the judge's error, by citing evidence on which the Respondent itself did not rely to justify Hearn's discharge. First, the majority cites Hearn's 5-day suspension on May 20, 1997. But the Respondent did not rely on that factor—and could not have relied on it, consistent with the contract (as it confirms in its own brief). As the majority states, the May 1997 suspension resulted from misconduct in early 1996, which preceded the February-June 1997 period on which the Respondent based the discharge. Second, the majority clearly refers to misconduct that occurred before the relevant February-June period in citing Hearn's "lengthy, varied, serious, and sustained" disciplinary history.

¹ I agree with my colleagues, for the reasons they have stated, that Board deferral to the joint grievance committee resolutions of Hearn's discharges on January 29 and on February 6, 1996, was required under *Spielberg Mfg. Corp.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), but that deferral would not be appropriate with respect to the July 1, 1997 and January 28, 1998 discharges.

the required *Wright Line* analysis. The Respondent based this discharge on Hearn's work record over a 7-month period during which Hearn received nine disciplinary warnings, two of which the judge again found were unlawfully motivated.⁴ In addition, as noted above, the Respondent had attempted to terminate Hearn for unlawful reasons only 6 months earlier, in what was essentially an identical scenario. Despite this showing of antiunion animus by the General Counsel, the judge again failed to impose the proper evidentiary burden and summarily found that the Respondent would have discharged Hearn solely on the basis of the lawful warnings, even absent his union activity. Again, the Respondent has offered no evidence, nor even contended to that effect, but rests on the generalized assertion that Hearn was discharged for his "overall work record." I would therefore find that the discharge on January 20, 1998 also violated Section 8(a)(3).

3. Transfer of John Krokey

I would also find that the Respondent unlawfully reassigned John Krokey to an inferior route, reducing his opportunity for overtime. In dismissing this complaint allegation on the ground of "confusion as to dates," my colleagues have unreasonably ignored the facts established in the record.

The Union's charge, alleging that Krokey's route was changed "on or about January 1, 1996," was filed on March 21, 1996. The complaint alleged an unlawful change of Krokey's route "since on or before October 28, 1995, and continuing thereafter." There is no dispute that Krokey's route was changed in August 1995, and that no timely charge was filed based on that change. However, although this is not mentioned by the majority or the judge, Krokey testified without contradiction that he stayed on his new route "for about three months," and that his route was then again changed for the worse.⁵ The complaint language, although inartful, does not limit the alleged violation either to immediately before or immediately after the date it specifies. I would find that it reasonably encompasses a change that occurred within "about three months" after August 1995—i.e., in approximately November 1995, which falls within the 6-month period before the Union filed its charge.⁶ The

judge also found that Krokey's route was in fact changed in January 1996, confirming that a change occurred in the same approximate timeframe. I would therefore find that the issue was litigated by the parties and that there is no reason not to make a finding based on the evidence. In concluding that to make a finding here would be "fundamentally unfair" to the Respondent because of "confusion as to dates," the majority confuses the due-process requirement of adequate notice prior to hearing with the Board's post-hearing duty to assess the evidence on record.

On the merits, in turn, the evidence supports finding a violation. Krokey had a high level of seniority, and he was an alternate union steward for all of 1995. In fact, the judge found that Supervisor John O'Connor unlawfully harassed Krokey specifically in his capacity as alternate steward in October 1995,⁷ prior to the date Krokey's route was changed. Based on this evidence, I would find that the Respondent acted with animus in changing Krokey's route, and has not borne its *Wright Line* burden of showing that Krokey's route would have been changed even if he had not engaged in union activity. The route change consequently violated Section 8(a)(3).

4. Transfer of John Mauer

Finally, I agree with the judge that the Respondent unlawfully transferred John Mauer, who had 30 years seniority, to a less desirable route. Unlike my colleagues, I find that the judge had ample evidence to support his conclusion that the transfer was motivated by antiunion animus. Mauer complained to his supervisor, Robert Culkar, that Culkar was performing bargaining unit work by unloading freight. Culkar told Mauer to file a grievance (which he said would be denied) and to get back to work. A few days later, there was another exchange between Mauer and Culkar about Culkar's performing bargaining unit work. Ten days after that, Mauer and several other drivers were assigned to more onerous and less remunerative routes. As the judge found with respect to Mauer, "[i]n addition to the overall evidence of [anti-]union animus by the Respondent," the Respondent had a "penchant for reacting unfavorably" to drivers who attempted to protect unit work from being performed by supervisors. The totality of evidence presented by the General Counsel satisfied his initial burden of showing antiunion animus.

The Respondent's exception with respect to this complaint allegation is based entirely on the terms of the parties' written collective-bargaining agreement, which correlate seniority only to the assignment of shifts (and not

⁴ The Respondent did not except to either of these findings by the judge.

⁵ The Respondent did not dispute this testimony, and ignores it in its brief.

⁶ The General Counsel's complaint is required to allege only "the approximate dates" of alleged misconduct, and need only give the Respondent "due notice and a full opportunity for hearing thereon." *Artesia Ready Mix Concrete*, 339 NLRB No. 159, slip op. at 3 (2003)(citing NLRB Rules Sec. 102.15).

⁷ The Respondent did not except to this finding.

specifically to routes). However, the contract clearly does not bar the application of seniority to route assignments, and Supervisor Mitchell's testimony confirmed that the Respondent does in fact use seniority as a factor in assigning routes. Mitchell also admitted that senior employees can and do challenge the assignment of more desirable routes to junior employees. I accordingly agree with the judge that the Respondent failed to show that Mauer would have been transferred to the inferior route if he had not engaged in union activity. *Wright Line*, supra. The transfer consequently violated Section 8(a)(3).

Dated, Washington, D.C. November 19, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discipline employees for engaging in union activities or other activities protected by federal law.

WE WILL NOT otherwise discipline employees for engaging in union activities or other activities protected by federal law.

WE WILL NOT prohibit employees from switching shifts for engaging in union activities or other activities protected by federal law.

WE WILL NOT refuse to hire job applicants because they belong to or support Teamsters Union Local 407, affiliated with International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT threaten to discipline employees for filing grievances or engaging in union activities or other activities protected by federal law.

WE WILL NOT harass employees for engaging in union activities by failing to notify them promptly in writing of disciplinary action taken against them.

WE WILL NOT harass employees for engaging in union activities by telephoning them at home late at night.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT publicly ridicule Teamsters Local 407, or publicly ridicule employees for engaging in union activities.

WE WILL NOT prohibit employees from conferring with their union stewards and alternate union stewards during nonworking time in nonworking areas.

WE WILL NOT transfer employees to more onerous routes or otherwise reassign them for engaging in union or other activities protected by federal law.

WE WILL NOT require employees to complete special work assignments for engaging in union activities or other activities protected by federal law.

WE WILL NOT accelerate the bidding process to hinder employees in bidding on routes for engaging in union activities or other activities protected by federal law.

WE WILL NOT refuse to allow employees to transfer to other routes because they have filed unfair labor practices charges with the National Labor Relations Board.

WE WILL NOT transfer employees to more onerous routes because they have engaged in union activities or other activities protected by Federal law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by federal law.

WE WILL offer Kevin Tanski a position as a regular part-time driver and establish his seniority date as December 15, 1995.

WE WILL make Kevin Tanski and Robert Hearn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Robert Hearn, John Root, and Michael Shuba, and, within 3 days thereafter, notify these employees and former employees in writing that this has been done and that the discipline will not be used against them in any way.

AIRBORNE FREIGHT CORPORATION

Nancy Recko, Esq., for the General Counsel.

Scott B. Gilly and James C. Bailey, Esqs., of Washington, D.C., for the Respondent.

Sorrell Logothetis, Esq., of Dayton, Ohio, of the Union.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Cleveland, Ohio, on October 26–30 and November 6–7, 1998. Charging Party Kevin Tanski filed the charge in Case 8–CA–28047 on February 23, 1996. Charging Party Teamsters Union Local 407 (Local 407 or Union) filed the charge in Case 8–CA–28113 on March 21, 1996, and amended its charge on September 27, 1996. Charging Party Michael E. Shuba filed the charge in Case 8–CA–28893 on March 19, 1997. Charging Party Robert Hearn filed the charge in Case 8–CA–28961 on April 16, 1997; the charge in Case 8–CA–29178 on July 11, 1997; and the charge in Case 8–CA–29636 on February 4, 1998. Charging Party Jon J. Krokey filed the charge in Case 8–CA–29357 on September 27, 1997, and the charge in Case 8–CA–29610 on January 20, 1998. Charging Party John Mauer filed the charge in Case 8–CA–29713 on March 5, 1998. Charging Party Wilma J. Conley filed the charge in Case 8–CA–29842 on April 20, 1998.

A third amended consolidated complaint (complaint) was issued on June 25, 1998.¹ It alleges that the Respondent violated Section 8(a)(1) of the Act on various dates between September 28, 1995, and February 11, 1998, by unlawfully threatening, harassing, interrogating, taunting, and surveilling certain union stewards, alternate union stewards, and union supporters, and by implying that their employment benefits would be denied because of their union and protected concerted activities. It further alleges that the Respondent violated Section 8(a)(3) of the Act at various times by unlawfully refusing to hire Charging Party Kevin Tanski (a union official); by unlawfully changing route assignments; by denying a request for a route change; and by unlawfully disciplining, suspending, and discharging the Charging Parties, as well as driver John L. Root, because of their union activity and support for the Union.

The Respondent's timely amended answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is an air express delivery company with an office and place of business in Beachwood, Ohio, where it annually derives gross revenues in excess of \$50,000 from the transportation of freight from the State of Ohio directly to points outside the State. The Respondent admits and I find that it is an employer engaged in com-

merce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE RESPONDENT'S MOTION TO DISMISS

At the hearing, and again in their brief, the Respondent's counsel sought to dismiss the allegations of the complaint contained in paragraphs 8(A) and (C), 9 (A) and (E), and 12 (B) and (E) on the grounds that these allegations are time-barred under Section 10(b) of the Act. Specifically, the Respondent asserts that the allegations either fall outside the 6-month statutory limitation period or they were never contained within the scope of a timely filed charge. I reserved ruling on the motion at the hearing. For the reasons stated below, the motion is granted in part and denied in part.

A. The 10(b) Standard

In determining whether the allegations in a charge support an otherwise untimely allegation in the complaint, the Board applies a "closely related" test. *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989). Specifically, the Board examines whether the otherwise untimely allegation in the complaint (1) involves the same legal theory as the timely allegation in the charge; (2) arises from the same factual circumstance or sequence of events; and (3) entails the same or similar defense by the Respondent. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). Thus, the original timely filed charge or timely amended charge must be carefully scrutinized to determine whether the allegation in the complaint is closely related.

B. Paragraphs 8(A) and (C)

Paragraph 8(A) of the complaint alleges that *on or before October 28, 1995*, and continuing thereafter the Respondent unlawfully changed the route assignment of Jon Krokey, which resulted in lost overtime. There is no corresponding charge for this allegation. A related allegation, which appears for the first time in the original charge filed by the Union on March 21, 1996, states, in pertinent part, that "on or about January 1, 1996, . . . [the Respondent] discriminatorily changed the route and reduced overtime of Jon Krokey. . . ." The Union's charge was amended on September 27, 1996, but not with respect to the alleged unlawful route changes.² The evidence shows that Krokey's route was changed in August 1995 (Tr. 1018) and January 1996. The Respondent correctly argues on brief at page 124, footnote. 70, that paragraph 8(A) should be dismissed because the August 1995 route change was not encompassed in Krokey's original charge and the evidence shows that the alleged violation occurred more than 6 months prior to the filing of the charge. *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). Accordingly, I grant the Respondent's motion to dismiss paragraph 8(A) of the complaint.

Paragraph 8(C) of the complaint alleges that on or about April 1, 1997, the Respondent violated Section 8(a)(3) of the Act by giving Jon Krokey a written warning for allegedly fail-

¹ There are 83 separately alleged violations of the Act contained in the complaint.

² There is no corresponding allegations in the complaint, nor does the General Counsel argue on brief, that Krokey's route was discriminatorily changed in January 1996.

ing to remove mail from his mail box. No charge was filed specifically asserting this allegation. Rather, counsel for the General Counsel argues that the allegation in the complaint is based on a charge filed by Krokey on September 29, 1997, alleging that “[s]ince on or about May 3, 1997, [the Respondent] . . . has discriminated against Jon Krokey and other employees because of their membership in and activities on behalf of Teamster Local 407, a labor organization.”

Although the Respondent concedes that the complaint allegation involves the same legal theory and the same legal defense as the allegation in the charge, it argues that it does not arise from the same factual circumstances or sequence of events because the conduct in the complaint allegedly occurred “on or about April 1, 1997,” and therefore it predates the conduct in the charge which allegedly occurred on or after May 3, 1997. Thus, the Respondent argues that the allegation in the complaint is outside the scope of the sequence of events that allegedly took place on or after May 3, 1997, and therefore should be dismissed.

In response, counsel for the General Counsel asserts that in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959), the Supreme Court held that a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint “are related to those alleged in the charge and . . . grow out of them while the proceeding is before the Board.” I find that *Fant Milling Co.* is inapposite because there, unlike here, the question was whether the Board could take cognizance of events occurring *subsequent* to the filing of the charge, where such events were related to those alleged in the charge and grew out of them while the proceeding was before the Board. The more appropriate case is *Dinion Coil Co.*, *supra* at 491, where the Second Circuit held, “If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within 6 months before the filing of the charge.”

The undisputed evidence shows that the alleged violation in the complaint occurred within six months before the filing of the charge. The evidence also shows that the complaint allegation is closely related in time to the charge allegation (i.e., 1 month before). Contrary to the Respondent’s assertions, I find that the complaint allegation is part of a sequence of events of alleged unlawful discrimination against Krokey that began 1 month earlier than reported in the charge, but nevertheless about the same time and certainly within 6 months before the filing of the charge. I further find, as conceded by the Respondent, that both allegations involve the same legal theory and legal defense. Accordingly, I deny the Respondent’s motion to dismiss paragraph 8(C) of the complaint.

C. Paragraphs 9(A) and (E)

Paragraph 9(A) of the complaint alleges that on or about February 5, 1996, the Respondent violated Section 8(a)(3) of the Act by denying John Root’s request to switch shifts. Paragraph 9(E) of the complaint alleges that on or about April 12, 1996, the Respondent violated the Act by reassigning Root to

more onerous work. No charge was filed specifically asserting these allegations. Rather, counsel for the General Counsel argues that the allegations in the complaint are based on a charge filed by the Union on March 21, 1996, alleging that “[o]n or about February 26, February 27, and March 1, 1996, [the Respondent] discriminatorily reprimanded John L. Root, an employee, because of his membership and activities [on behalf of the Union].” The evidence shows that this charge was amended on September 27, 1996, to allege, among other things, that “[s]ince on or about the six month prior to March 21, 1996,” the Respondent has generally interfered with the rights of the employees under Section 7 of the Act. No new specific allegations of unlawful conduct against Root were included in the amended charge.

Although the Respondent concedes that the complaint allegations involve the same legal theory as the allegations in the charge, it argues that they do not arise from the same factual circumstances or sequence of events. I disagree. The action allegedly taken by the Respondent against Root occurred within a 2-month period after he circulated a petition on behalf of the Union. Thus, the allegations are part of a sequence of events. The Respondent also argues that the denial of a shift switch and the alleged assignment to more onerous work will require a different defense from that required for allegations of discriminatory verbal and written warnings. I disagree. Both involve an alleged violation of Section 8(a)(3) and both will require the Respondent to show that its actions were legitimate and nondiscriminatory or that it would have taken the same action, notwithstanding Root’s support for the Union. Accordingly, I deny the Respondent’s motion to dismiss paragraphs 9(A) and (C) of the complaint.

D. Paragraphs 12(B) and (C)

Paragraph 12 (B) of the complaint alleges that on or about October 2, 1997, the Respondent unlawfully issued a written warning to Wilma Conley for an alleged failure to input a dollar value on a C.O.D. shipment. Paragraph 12 (C) of the complaint alleges that on or about October 17, 1997, the Respondent unlawfully issued a written warning to Conley for an alleged failure to follow instructions. On April 20, 1998, Conley filed a charge alleging that from on or about December 7, 1997, she was discriminated against because of her union activity. Thus, neither of the allegations in the complaint were included in the charge. Even if they were included in the charge, they would be time-barred because they occurred outside the 6-month limitation period of Section 10(b) of the Act.

The General Counsel does not dispute that no charge was filed specifically asserting these allegations. Rather, she argues that they are encompassed in the charge filed on September 29, 1997, by Krokey alleging that he and “other employees” have been discriminated against because of their union membership and activities. The argument is unpersuasive. Krokey filed the charge on behalf of himself. To stretch the boundaries of his charge to encompass all “other employees” would render meaningless the specificity required by Board Rule 102.12(d) that a charge contains a “clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce.”

Accordingly, I grant the Respondent's motion to dismiss paragraphs 12(B) and (C) of the complaint.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of the Case

The Respondent is an air express delivery company with facilities located throughout the United States. In the Greater Cleveland, Ohio area, it has two terminals within reasonable proximity of each other: Beachwood and Middleburg Heights. Truckdrivers employed at these two locations are represented by Local 407 and covered by a nationwide collective-bargaining agreement known as the National Master Freight Agreement (NMFA). Local 407 also represents a clerical unit at these terminals covered by a separate clerical contract.

Shortly after he began working as a driver for the Respondent in 1985, Charging Party Robert (Bob) Hearn became a union steward. In 1991, he became the union steward for the newly opened Beachwood terminal. Hearn was a firm believer in making sure the Respondent and the drivers observed and adhered to the NMFA. He would admonish employees for not adhering to the letter of the contract and chastise supervisors for performing bargaining unit work. Although Hearn was fairly successful as a union steward in working out problems with management, he was caustic and used profanity in his dealings with management and the drivers.

During the first 10 years as union steward, Hearn's work performance was less than impressive. During this time, he received several warnings for tardiness and absenteeism. In 1989, he was cited for insubordination toward a supervisor who reprimanded him for using the two-way radio in his truck while on duty to solicit grievances from other drivers. On one occasion, Hearn received a warning after a customer complained about his flippant attitude (R. Exh. 26). On another occasion, he was warned about misusing company time (R. Exh. 28). In March 1994, Hearn was discharged after failing to notify the Respondent that his driver's license had been suspended and for operating company vehicles and equipment on a suspended license.³ (R. Exh. 32.) Thus, by the mid-1990s, Bob Hearn's reputation as a union steward and employee were well known to the Respondent's management. That reputation is of significance at this juncture because it was a factor in the Respondent's reluctance to hire Union Trustee Kevin Tanski.

1. Kevin Tanski

Charging Party Kevin Tanski was elected union trustee of Local 407 in 1990 and was reelected in 1993. At that time, he was a driver for another air freight company. In 1995, Tanski sought the help of Union President Sam Theodus to get a job with the Respondent as a casual driver⁴ at the Middleburg Heights terminal. Beginning in June 1995, and for several weeks thereafter, Theodus made several phone conversations

on Tanski's behalf to Andre Parson, the Respondent's regional field manager, and Thomas (Tom) Hearn, the district field service manager (DFSM) for Middleburg Heights. Both managers expressed a reluctance to hire Tanski because of problems that the Respondent had with union steward Bob Hearn and a former union steward Bob Winger. Eventually they agreed to give Tanski a chance to prove himself. Tanski submitted an employment application, and on September 25, 1995, Theodus placed his name on a union maintained preferential hiring list. But after that, Tanski did not hear from the Respondent.

In a December 15 phone conversation with Parson, Theodus demanded that Tanski be hired as a regular part-time driver. Three months had passed since Tanski's name was placed on the Union's preferential hiring list, but he never once was called. During this time, however, the Respondent hired eight casual drivers, none of whom was on the preferential hiring list. Thus, Theodus reasoned that Tanski should not have to serve a probationary period. Parson agreed to hire Tanski. Later that day, he faxed a letter to Theodus, which in part stated that the Respondent "agrees to hire Kevin Tanski as a regular employee provided he passes the preemployment drug screen. He will not be required to complete a probationary period."

Although it appeared that Theodus had succeeded in obtaining employment for Tanski as a regular part-time driver, Parson instructed DFSM Tom Hearn to hire Tanski as a casual driver. Unaware of Parson's instructions to Hearn, the Union, on December 29, 1995, filed a grievance on behalf of Tanski asserting that the Respondent failed to hire him off the preferential hiring list in violation of the contract, and instead inappropriately hired eight casual drivers after Tanski's name was added to the list on September 27. The remedy sought was employment as a regular full-time driver with seniority as of October 6, 1995.

A week or so later, the Respondent notified Tanski to report to the Middleburg Heights terminal to complete paperwork and take a drug test. Tanski was asked to sign a letter of understanding of casual employee. When he questioned the reference to "casual" employee, he was told that he had to sign the paper in order to be hired. Tanski signed the document. The following month, when he was called to report to work, Tanski asked if he would be working as a regular part-time driver? He was told "no," so Tanski refused to report to work.

Almost 2 years later, on November 27, 1997, an arbitrator decided the grievance filed by the Union on behalf of Tanski. In a terse written opinion, the arbitrator found that Tanski was not entitled to regular full-time employment, but that he should be placed on a preferential hiring list as a casual driver with a seniority date of December 29, 1995, the date the grievance was filed.

Paragraph 7(A) of the complaint alleges that the Respondent unlawfully failed to hire Tanski on December 15, 1995.

2. Transition at Beachwood

Prior to becoming the DFSM at Middleburg Heights, Tom Hearn was the DFSM at the Beachwood terminal. As the Respondent's business increased in the mid-1990s, Hearn placed an emphasis on operating the Beachwood terminal more efficiently by implementing corporate policies and procedures that

³ After a hearing on a grievance filed by Hearn, the discharge was reduced to a 4-week suspension. (Tr. 632.)

⁴ Casual drivers are called on to drive routes and fill-in for regular drivers who are absent. In many cases, casual drivers who perform well are made regular part-time drivers and then full-time regular drivers.

had existed for some time, but had not been followed by his immediate predecessor. That necessarily involved changing work practices that had been approved, either expressly or tacitly, by prior DFSMs, but were inconsistent with the Respondent's desire to better serve its customers in an increasingly competitive business environment. Notwithstanding the efforts of DFSM Tom Hearn to take the Beachwood terminal in a different direction, Union Steward Bob Hearn was fairly successful in working out problems with DFSM Tom Hearn because Tom Hearn at least would listen to another point of view.

In July 1994, William Kowal became the DFSM at Beachwood, replacing Tom Hearn who was transferred to Middleburg Heights. A graduate of the United States Military Academy, and former Army officer, Kowal adhered to the changes implemented by his predecessor, Tom Hearn, and sought to implement other changes in an effort to enhance further the efficiency of the Beachwood terminal. With the assistance of Supervisor John Mitchell, another graduate of the United States Military Academy, Kowal published work rules designed to ensure that the drivers met corporate standards and adhered to corporate policies.⁵

Kowal's management style, however, differed from that of his predecessor, Hearn. He was not a good listener and he was not interested in how things were done in the past. According to Union Steward Hearn, Kowal had his own way of doing things as reflected by an authoritarian management style in which comment or criticism were not well received and often were interpreted as a sign of disrespect. Kowal's disinterest in work practices that had been followed by prior Beachwood DFSMs set the stage for a confrontational relationship with Union Steward Hearn, who viewed the abrogation of those practices as the first of a series of attempts to undercut the provisions of the contract.

Discipline was the centerpiece of Kowal's agenda for improving the operation of the terminal. When he arrived at Beachwood, he felt that the terminal needed some overall discipline because it was not in compliance with Company standards. (Tr. 1359.)

According to Kowal, the overall operation needed "a little bit of tweaking and, you know, instilling discipline and having a compliant work force." (Tr. 1359.) After identifying the areas in which the Beachwood terminal did not meet corporate standards, Kowal, through his supervisors, began implementing various steps to bring the terminal into compliance. His efforts met with some resistance along the way, but his management philosophy remained unchanged. As Kowal put it, "if you want to work for Airborne Express, this is the way you're gonna do it, guys. And eventually it led to some form of written discipline for those individuals that failed to comply." (Tr. 1360.)

Under the NMFA, no driver could be suspended or discharged unless he had received a written warning within the previous 9 months. An exception existed for several enumerated "cardinal" offenses which warranted immediate discipline (e.g., drunkenness, failing to report an accident, or carrying an

unauthorized passenger). Because the route and location of all freight is closely monitored by computer, the activity of the drivers delivering that freight is also closely monitored and reflected on computer generated reports. If a computer generated report reflected that a driver's performance was out of compliance with corporate standards, a supervisor often issued a warning letter to the driver without further investigation or any contact with the driver concerning the surrounding circumstances. Occasionally, a computer error resulted in an unwarranted warning. Eventually if a driver received a series of warnings within a 9-month period, the company held a local disciplinary hearing to determine whether further discipline (i.e., suspension or discharge) was warranted. These local disciplinary hearings were normally attended by the DFSM, a supervisor, the Union's business agent, a union steward or alternate steward, and an employee. Under Kowal's administration, the disciplinary process was a tool for bringing about a compliant work force.

3. Robert Hearn

a. The Kowal era

Between June 1994, the time Kowal became the Beachwood DFSM, and September 1995, Bob Hearn was disciplined on several occasions.⁶ He received warning letters for failing to download his scanner properly (R. Exh. 36), excessive tardiness (R. Exh. 37), instructing drivers to slow down and delay completing their assignments (R. Exh. 38), working over 60 hours in 1 week (R. Exh. 40), calling a supervisor a "f---in' puke" (R. Exh. 41), and while on route, flipping the finger to a lady driver, who reported the incident to the Respondent. (R. Exh. 42.) He also was suspended on August 30, 1995, for referring to the Beachwood managers as "assholes." (R. Exh. 44.)⁷ In short, Hearn was not exactly a "model" employee during Kowal's first year as DFSM.

More than a year after Kowal's arrival at Beachwood, he and Hearn had a falling out over an "understanding" about allowing the drivers adequate time to restock their trucks. When Hearn learned that some supervisors were loading supplies onto trucks at the end of the workday, he complained to Kowal that they had an understanding that the drivers would be allowed time to perform this work. Kowal did not confirm or deny that there was an informal agreement. Rather, he told Hearn to file a grievance. Kowal also told Hearn that he was going to do whatever it took to keep his job and if Hearn wanted to get cut-throat about it, he would start writing up all the drivers. (Tr. 414.)

A few days later, Hearn was suspended for socializing on the dock and laughing off a directive by Kowal to get out on the road. That was the first of many disciplinary actions, taken against Hearn over the next 17 months, which culminated in termination on February 6, 1996. Although Hearn grieved the termination, he was held out of work for approximately 4 months while it was being processed. In late May 1996, an

⁵ The complaint does not allege that the implementation of the work rules or efforts to ensure compliance with corporate policies constituted a violation of Sec. 8(a)(5) of the Act.

⁶ None of these disciplines is the subject of any allegation in the complaint.

⁷ There is no evidence that Hearn filed unfair labor practice charges concerning any of the discipline he received prior to September 1995.

Ohio Joint State Grievance Committee reduced his termination to a 5-day suspension.

Paragraphs 10(A)-(N) and 6(A)-(C) of the complaint allege that while Kowal was the Beachwood DFSM, Union Steward Bob Hearn was unlawfully threatened, disciplined through discharge and assigned to more onerous routes because of his union activity.

b. The Mitchell era

Shortly after Hearn returned to work in June 1996, Supervisor John Mitchell became the Beachwood DFSM, replacing Kowal who became the Middleburg Heights DFSM. Hearn's rapport with Mitchell was no better than his rapport with Kowal. It was Hearn, who called Mitchell a "f—k-in puke," to his face in July 1995. That irreparably tarnished their working relationship. Mitchell, like Kowal, was proficient at utilizing the disciplinary process to correct workplace problems. (Tr.1435.) Even though Hearn resigned as union steward shortly after Mitchell became DFSM, Mitchell did not pass up an opportunity to discipline Hearn and eventually discharge him.⁸

Between November 13, 1996 and January 20, 1998, Hearn accumulated approximately 18 warning letters and at least 3 suspension letters. In and around January 1997, his route was changed several times and he was told by Mitchell that he could not bid on another route because he had filed unfair labor practice charges. However, in many ways Hearn was his own worst enemy. He had a tardiness problem and his performance was unsatisfactory on several occasions. Eventually Hearn was discharged on January 20, 1998, and the Ohio State Joint Grievance Committee upheld the discharge.

Paragraphs 10(M)-(MM) and 6(H)-(K) of the complaint allege that Hearn was threatened, disciplined, harassed, and denied a route change because of his union activity.

4. John Root

Driver John Root was a second shift driver at the Beachwood terminal during the time Kowal was DFSM. For years, the Respondent had an informal practice of allowing drivers to switch shifts with the approval of their supervisor. On January 23, 1996, Root obtained his supervisor's approval to switch shifts with another driver.

A week or so after obtaining his supervisor's approval, Root became an alternate union steward entrusted with the task of circulating a petition among the drivers attesting to the fact that Supervisor John O'Connor had used profane language when talking to the drivers or giving them instructions. The petition was intended to be used by the Union in a disciplinary hearing seeking to discharge union steward Bob Hearn for using profanity.

When Kowal learned of Root's involvement with the petition, he revoked the permission for Root to switch shifts. When Root sought out Kowal for an explanation, Kowal told him that

the request had been denied because Root "fucked him." With petition in hand, Kowal told Root that any criticism of his supervisors reflected poorly on him and if Root became involved in any driver dispute he would be fired. Kowal also told Root to go out, do his job, mind his own business, and there would be no problems. He cautioned Root, however, that if he sided with the Union against the Company, he would lose. (Tr. 720.)

The following week, Root's supervisor radioed him to phone the office. When he did, Kowal picked up the phone demanding to know what Federal law he had violated. Unsure what Kowal was referring to, Root started to explain, but was cut-off by Kowal, who told him to file a grievance. Kowal also told Root that he was giving him a verbal warning for directing the part-time work force. Root had no idea what Kowal was talking about.

A few days later, Root attended a local disciplinary hearing as alternate union steward concerning the suspension of union steward Bob Hearn. In the course of that hearing, Kowal began discussing the petition circulated by Root. He challenged the validity of the petition and accused Root of coercing drivers to sign it. Root denied the accusations. Later that day, Root received another warning letter purportedly for being insubordinate to a supervisor over the two-way radio two days earlier.

In February-March 1996, Root was out of work for almost six weeks due to a work related back injury. After he was certified by his physician to return, his supervisor told him that he would be assigned to his old route. Instead, Root was placed on the dock, pulling, pushing, and lifting heavy objects. He was not reassigned to his old route, until sometime later.

Paragraphs 9(A)-(E) and 6(F)-(G) of the complaint allege that while Kowal was the Beachwood DFSM, John Root was unlawfully harassed, disciplined, denied a shift switch, reassigned, and also threatened in violation of the Act.

5. Jon Krokey

a. The Kowal era

Charging Party Jon Krokey became the alternate union steward at the Beachwood facility in 1992. He, like Hearn, sought to ensure that management and the drivers adhered to the contract. In the first 12 months of Kowal's tenure as DFSM, Krokey received two disciplinary warnings neither of which are alleged to have been issued because of his union activity. In March 1995, he received a warning letter for failing to deliver freight. In July 1995, he received a warning letter for using profane language toward Supervisor John Mitchell. (R. Exh. 71.)

In October 1995, Krokey was passing the Union bulletin board, when he overheard his supervisor, John O'Connor, reading aloud from a Union notice on the board urging the drivers to become more involved. Over and over again, O'Connor repeated, "Its time to get involved." Although neither individual spoke to the other at the bulletin board, O'Connor followed Krokey into the restroom. While standing at adjacent urinals, O'Connor stated, "It is an honor and a pleasure to piss in the same restroom as Jon Krokey, alternate union steward." When Krokey did not respond, O'Connor asked, "What's wrong, cat

⁸ Even though Hearn resigned as union steward, Mitchell suspected that he was still the ex officio union steward. For example, on or about February 11, 1997, which was over six months after Hearn resigned, Mitchell told him "we still know that you're calling the shots around here." (Tr. 506.)

got your tongue?" Krokey replied that he did not speak to idiots. Nothing more was said. No discipline followed.

Five months later, Krokey received a warning letter, dated March 14, 1996, for entering a wrong code in his scanner on March 12 and 13. The next day, March 15, he intervened in a heated argument between driver Rita Ineman and Supervisor John Mitchell over some freight that Ineman missed going down the conveyor belt. Krokey advised Ineman that she could break off the conversation if she thought it could lead to discipline. When Ineman elected to continue the debate with Mitchell, Krokey told her to stop. The conversation ended with Mitchell telling Krokey to mind his own business, that he was not allowed to conduct union business on company time, and to go back to work. This all happened the day after Krokey was sent the warning letter.

Paragraphs 8(B) and 6(D)-(E) of the complaint allege that while Kowal was the Beachwood DFSM, the Respondent unlawfully threatened, disciplined, and changed the route assignment of Jon Krokey in violation of the Act.

b. The Mitchell era

In the summer 1996, Krokey resigned as alternate union steward and Mitchell replaced Kowal as Beachwood DFSM.⁹ Between June 1996 and March 1997, Krokey received four warning letters and a 1-day suspension.¹⁰

On or about April 1, 1997, or 9 months after he resigned as alternate union steward, Krokey received a warning letter for failing to remove papers from his mailbox. Although Krokey checked the box when he arrived for his shift, he did not check it again before leaving on his route to see if anything was placed there in the interim.

On July 2, Krokey inadvertently locked his keys in his truck. After several telephone exchanges with the office, and a lengthy delay, the locks were drilled out and the truck was towed. The end result was that Krokey received a warning letter for being careless.

Over the next 6 months, Krokey received three more warning letters and attended two disciplinary hearing concerning his overall work record and unexcused absences. In January 1998, around the time of the annual east-west bid, his route was changed along with several other drivers.

Paragraphs 8(C)-(H) of the complaint allege that between April 1997-January 1998, the Respondent unlawfully disciplined Jon Krokey because of his union activities and because he was union member.

6. Michael Shuba

Michael Shuba worked the night shift at the Beachwood terminal. He was never a union steward or alternate union steward. He never held any union position. Rather, Shuba was a self-appointed "overseer" of the night shift, who would advise Union Steward Bob Hearn of problems on the shift, seek his advice, confer with employees, and informally help them file

grievances. Shuba also made sure that the drivers adhered to the contract and on more than one occasion was disciplined for telling drivers to stop what they were doing because it contravened the contract. (R. Exh. 88 at 3-7.)

In late December 1996, a time when Mitchell was the Beachwood DFSM, Shuba filed three grievances objecting to supervisors performing bargaining unit work. On January 8, 1997, a company hearing was held to discuss the grievances, all of which were resolved in Shuba's favor. Toward the end of the meeting, however, Mitchell called for a review of Shuba's overall work record. When the meeting ended, Shuba received a 5-day suspension that was held in abeyance while he grieved the discipline.

Shortly thereafter, Shuba received a series of four warning letters, all of which, but one, were rescinded or reduced upon further investigation. On January 17, Shuba received a warning letter for misusing the two-way radio. As it turned out, there was no way to know for sure the identity of the driver on the radio, so the warning was rescinded. On January 27, Shuba received a warning letter for failing to properly scan a package. Shuba insisted that he had scanned the parcel. A cross-check of the Respondent's records revealed that the computer had made an error. This warning was also rescinded. On March 26, Shuba received a warning letter for taking 2 15-minute breaks back-to-back. It was reduced to a verbal warning because of the confusion concerning the applicable policy. On April 1, Shuba, along with Krokey, and two other drivers received a warning letter for failing to remove communications from their mailbox.

Paragraphs 11(A)-(D) of the complaint allege that the Respondent unlawfully harassed and disciplined Shuba because he engaged in protected concerted activity.

7. Wilma Conley

Wilma Conley is a customer service agent at the Beachwood terminal. She belongs to the clerical bargaining unit represented by Local 407. In February 6, 1997, she became an alternate union steward for the clerical unit. Two weeks after that, she attended a disciplinary hearing to consider a clerical employee's overall work record for excessive tardiness. Several months later, she attended two more disciplinary hearings in early August.

In late September 1997, Conley received a warning letter for failing to properly respond to a message in the computer. Between December 1997 and March 1998, she received four warning letters and two letters of suspension on various dates for various workplace infractions and a poor overall work record.

Paragraphs 12(A), and (D)-(H) allege that Conley was disciplined because of her union activity as an alternate union steward in violation of the Act.

8. John Mauer

John Mauer is a 30-year driver employed at the Middleburg Heights terminal. He was never a union steward or alternate union steward. Over the years, however, Mauer occasionally complained to management about supervisors performing bargaining unit work.

⁹ Unlike Hearn, there is no evidence that Mitchell assumed or suspected that Krokey was serving as an ex officio alternate union steward.

¹⁰ None of these disciplinary actions are the subject of any allegations in the complaint.

In late December 1997,¹¹ Mauer observed his supervisor, Robert Culkar, unloading freight and pointed out to him that he was performing bargaining unit. Mauer was told to file a grievance and get back to work.

A few days, Mauer failed to call the dispatcher before 1 p.m. with the number of packages that remained on his truck. He received a warning letter.

On or about January 2, 1998, Mauer again saw his supervisor loading a truck, while another employee stood by watching. Culkar told Mauer that he was training the employee, and that it was permissible under the contract.

On January 12, Mauer and several other drivers had their routes changed. The route changes coincided with the east-west bid, a territory transfer in which a portion of the area serviced by Middleburg Heights area was transferred to the Beachwood terminal, and an effort by management to reduce the amount of overtime being worked by the drivers.

On January 22, Culkar radioed Mauer to determine the number of parcels left on his truck. Mauer needed to pull to the side of the road in order to get an accurate count, which was not uncommon for him to do, but nevertheless slows down route delivery.

Around the same time, a computer-generated report showed that Mauer had failed to make several express deliveries in a timely manner. His supervisor at the time, Debbie Jordan, counseled him about prioritizing his deliveries so that express deliveries and second day service (SDS) deliveries were made simultaneous along the route up to the point where Mauer was required to concentrate solely on the express deliveries in order to get them completed by noon. Mauer somewhat misunderstood Jordan's directive and continued to make SDS deliveries before completing his express deliveries.

Because of Mauer's high number of express delivery failures and low stops per hour ratio, Culkar scheduled him for a check-ride. The Respondent had a check-ride program for new drivers and regular drivers who were not performing as expected. Over a 2-day period, Culkar critiqued Mauer on various aspects of his job performance and told him if his performance did not improve he would have a check-ride everyday until he retired.

Paragraphs 13(A)-(C) and 6(M)-(P) of the complaint allege that because Mauer engaged in protected concerted activity his route was changed, he was disciplined, and he was harassed in violation of the Act.

B. The Applicable Legal Standards

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.¹² To do so, there must be evidence of protected activity, knowledge, animus, or hostility, and adverse action, which tends to encourage or discourage the protected

activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity or that the reasons for the decision are not pretextual. *T&J Trucking Co.*, 316 NLRB 771 (1995).

On the other hand, the test under Section 8(a)(1) does not turn on employer motivation or whether the coercion succeeded or failed. Rather, the test is whether the employer engaged in conduct which reasonably tends to interfere with the exercise of employee rights under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995). Section 8(a)(1) prohibits direct threats and implicit forms of interference.

C. The General Counsel's Evidence

1. Tanski, Hearn, and Root

There is no dispute that Tanski, Hearn, and Root were all Union officials, known to the Respondent. There also is no dispute that Tanski applied for a job with the Respondent, but was not hired, and that Hearn and Root were disciplined by the Respondent after engaging in protected activity.

In addition, ample evidence exists of antiunion animus. Both Regional Manager Andre Parson and DFSM Tom Hearn told Union President Theodus that they were reluctant to hire Tanski because of problems that the Respondent had with Union Steward Bob Hearn and former Union Steward Bob Winger. Although they did not explain what they meant by their remarks, the fact that they looked upon Tanski in the same light as two controversial union stewards supports a reasonable inference that they were opposed to hiring Tanski, in part, because he was a union official. In addition, the evidence shows that between the date on which Tanski's name was added to the Union preferential casual hiring list, September 27, and December 15, 1995, the date on which Parsons agreed in writing to hire him, 8 casual drivers were hired by the Respondent, none of whom was on the Union's preferential hiring list. This evidence supports a reasonable inference that Tanski was treated differently from other applicants because of his union affiliation.

With respect to Bob Hearn, DFSM Kowal told him to file a grievance, but quickly added that if Hearn wanted to get cut throat he would retaliate by writing up all the drivers. (Tr. 414.) Even after Hearn resigned as union steward 10 months later, Mitchell still perceived him as performing that function. Hearn's un rebutted testimony was that on two occasions in January-February 1997, Mitchell told him "we still know you're calling the shots around here," and "Bob, I've been watching you. People are still coming to you and asking you questions, as if you're the union steward." (Tr. 505, 514.) Around the same time, Mitchell told Hearn that he would not change his route because of the unfair labor practice charges that he filed. (Tr. 504-505, 676-677.) That statement, standing alone, is persuasive evidence of animus.

The un rebutted evidence shows that Kowal also told Root not to get involved with the Union, but to mind his own busi-

¹¹ At the time, David Boozer was the Middleburg Heights DFSM.

¹² *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

ness, do his work, and there would be no problems. He then added that if Root sided with the Union against the Respondent, he would lose (Tr. 720) and he would be disciplined.

Thus, I find that with respect to Tanski, Hearn, and Root, the General Counsel has satisfied her initial burden of persuasively establishing that the Respondent's conduct, in part, was unlawfully motivated.

2. Krokey

Regarding Krokey, there is no dispute that he also was a union official, known to the Respondent, and that evidence of animus exists. Shortly after Kowal warned Hearn that he would start writing up the drivers if Hearn wanted to get cut throat, Krokey's supervisor, John O'Connor, stood at the union bulletin board mocking a union solicitation for its members to become more involved. Minutes later, he unsuccessfully taunted Krokey in the restroom about his position as alternate union steward. This evidence, combined with the other evidence of animus, supports a reasonable inference that the Respondent opposed union activity.

The evidence does not reflect, however, a nexus between Krokey's union activity and the discipline which occurred almost 9 months after he resigned as alternate union steward. There is no evidence that the Respondent knew that Krokey was informally advising drivers on various matters nor is there any evidence that he was disciplined because of past union activities or out of the belief that he was still engaged in union activities. As more fully explained below, the General Counsel therefore has not satisfied her initial evidentiary burden.

3. Shuba and Mauer

The evidence shows that Shuba engaged in protected concerted activity, which was known to Mitchell, who was involved directly or indirectly with the warning letters that Shuba received afterwards. Animus exists because at the same hearing convened to resolve Shuba's grievances, Mitchell suddenly announced a review of Shuba's overall work record and gave Shuba a 5-day suspension. The timing of the review supports a reasonable inference that it occurred in response to Shuba engaging in protected concerted activity.

The evidence likewise shows that Mauer engaged in protected concerted activity, which was known to the Respondent, and that soon afterwards he received a warning letter and his route was changed. In addition to the overall evidence of animus by the Respondent, animus is inferred from the Respondent's penchant for reacting unfavorably to drivers, who filed grievance protesting a supervisor's conducting bargaining unit work.

Thus, I find that the General Counsel has satisfied her initial evidentiary burden with respect to Shuba and Mauer.

4. Conley

The evidence shows that Conley was an alternate union steward in the clerical bargaining unit, known to the Respondent. There is no direct evidence of animus toward her nor can animus be inferred from the timing of her disciplinary action or the manner in which she was disciplined. As more fully explained below, I find that the General Counsel has not satisfied her initial evidentiary burden with respect to Conley.

D. Alleged Violations Concerning Kevin Tanski

1. The initial effort to get Tanski hired

Kevin Tanski was elected a trustee of the Union in 1990 and again in 1993. Both times he was employed by another air freight company.¹³ During his election campaigns in 1990 and 1993, Tanski visited the Respondent's Middleburg Heights terminal to solicit the support of the drivers on the dock. Both times Tanski was asked to leave the premises by Terminal Manager Rachelle Iacoffano.

In 1995, Tanski sought the help of Union President Sam Theodus in obtaining employment with the Respondent.¹⁴ Theodus phoned Thomas Hearn, who at the time was the DFSM for the Middleburg Heights facility, and asked him to hire Tanski as casual driver. Hearn testified that he told Theodus, "We'll give it a shot. You know, we'll give him a look and, you know, tell him to fill out an application." (Tr. 1324.) Theodus also testified that Hearn told him to call Andre Parson, the Respondent's regional field manager about hiring Tanski. (Tr. 315.)

Theodus talked to Parson later that day about hiring Tanski. According to Theodus' un rebutted testimony, Parson told him that "he didn't want the same problem that we had with Bob Winger," a former union official who had been employed by the Respondent. (Tr. 316.) Parsons also mentioned Bob Hearn, who at the time was a union steward employed by the Respondent at the Beachwood terminal. Theodus did not ask Parson to elaborate, and Parson did not offer to do so. Rather, Theodus asked Parson to give Tanski a chance.

A short time later, Tanski submitted an employment application. Hearn told him he would keep it on file and call him if there was any work available. In the meantime, Hearn spoke to Union Business Representative Vic Collova about hiring Tanski.

Collova and Tanski were not on good terms. In 1990, Collova ran against Tanski for union trustee and lost. Afterwards there was altercation of sorts between Tanski and Collova, that was resolved by the International Union. According to Hearn, Collova referred to the altercation in their phone conversation, but did not go into details. On the basis of his conversation with Collova, Hearn testified that "I didn't feel that Vic was giving an endorsement of Kevin Tanski" (Tr. 1325), which caused Hearn to "have some reservations about Kevin . . . coming on as an Airborne driver." (Tr. 1326.)

Collova remembered the conversation with Hearn differently. He testified that when Hearn asked him about Tanski, he told him that "Kevin Tanski was a good worker. Despite some of the things he might say, Kevin may be a little strange in many ways but he was an excellent worker and that's pretty much what the conversation was on my side." (Tr. 395.) Collova stated that Hearn brought up an incident where Tanski was campaigning for union office at the Middleburg Heights terminal and was asked to leave the facility. Although Tanski left, he returned through another door and was caught by the terminal

¹³ A trustee is not a paid full-time position with the Union.

¹⁴ Tanski had twice before unsuccessfully applied for employment as driver with the Respondent in 1990 and 1993.

manager. Colluva stated that the incident concerned Hearn because Tanski was a nonemployee leafleting on the Respondent's premises. (Tr. 406.) Colluva testified that he nevertheless sought to allay Hearn's concern by stating that while Tanski was employed by Emery, he was an excellent worker. (Tr. 395-396.)

Tom Hearn's testimony about the conversation was very general and vague. Colluva's recollection was more precise. For these, and demeanor reasons, I credit Colluva's testimony that he told Hearn that Tanski was an excellent worker.

In summer 1995, Theodus made several calls to Hearn and Parson, but neither would agree to hiring Tanski. According to Theodus' unrebutted testimony, both managers kept telling him that they were afraid of hiring Tanski because of Bob Hearn and Bob Winger (Tr. 318). Both also kept telling Theodus that they were "going to put him on," but they never did. Parson blamed Hearn for the delay and Hearn blamed Parson.

Parson denied telling Theodus that he was going to hire Tanski. This aspect of his testimony is incredulous, contradictory, and confusing. At first Parson testified that he did not make the decision to not hire Tanski. Rather, he left that decision to Hearn. (Tr. 27-28.) He then testified that he told Theodus during the summer of 1995 that he made the decision not to hire Kevin Tanski (Tr. 28), which is confusing in light of his earlier testimony that he did not make that decision. Parson contradicted himself again by stating that ultimately he made the decision not to hire Tanski. (Tr. 36.) The latter statement was contradicted by Hearn, who testified that he made the decision not to hire Tanski because Parson doesn't really get involved in local hiring decisions. (Tr. 1349.) Thus, after having observed Parson testify, and having listened to and reviewed his testimony, I find, for these and demeanor reasons, that this aspect of his testimony is not credible.

During the same timeframe, Theodus phoned the Respondent's director of labor relations, Vince Degan, to ask him about hiring Tanski.¹⁵ According to Theodus' unrebutted testimony, Degan told him in August 1995 that the Respondent was "worried about putting Tanski on because of Bob Winger and Bob Hearn and they didn't want any problems. . . ." (Tr. 319.) Shortly thereafter, on September 27, 1995, Theodus placed Tanski's name on a Union maintained preferential hiring list for casual employees.¹⁶

2. The December 15 phone call

The Union also represents a clerical unit at the Respondent's Cleveland facilities. During the summer and fall of 1995, Theodus was involved with renegotiating the collective-bargaining agreement for those employees. A ratification vote was scheduled for mid-November 1995. In a telephone conversation a few weeks before the ratification vote, Parson expressed a desire to get the clerical contract ratified and told Theodus that if the clerical contract were to be ratified he would give Tanski a job. Theodus balked. He credibly testified that he told

Parson that "we didn't operate that way" and that he would not be involved in using a contract to get someone a job. (Tr. 320.) Parson did not rebut this testimony.

On December 15, Parson phoned Theodus because the clerical contract had not yet been ratified. He was concerned about the possibility of the clerical unit going on strike. Unbeknownst to Parson, the Union had scheduled a ratification vote for December 17. Parson asked Theodus if there was going to be a strike. Theodus told him that there would be no strike as long as they were negotiating. Parson then asked Theodus if there would be a ratification vote and Theodus said, "Yes." (Tr. 58.) Theodus also told Parson that a vote had been scheduled for December 17. (Tr. 57, 53.) According to Parson, Theodus then asked, "Are you going to put Tanski on?" Parson replied, "as a casual," and Theodus said, "No, as a regular." (Tr. 43.) As Theodus explained, "When we got to this point in December I said hire him as a regular. Why should he go through the probationary period; you've been screwing around all this time." (Tr. 341.) When Parson agreed to hire Tanski as a regular part-time employee, Theodus asked him to put it in writing. (Tr. 340.)

Parson hung up the phone and called his boss, Bill Boe, director of labor relations, to run the scenario by him. He told Boe that Theodus wanted a letter stating that the Respondent was going to hire Tanski. Boe told Parson "to go ahead and do it but, he says, is he going to" go forward with a ratification vote. When Parson told Boe that Theodus would go forward with the vote, Boe told Parson to put that in the letter as well. (Tr. 45.) Parson faxed a letter to Theodus which stated:

Per our phone conversation this a.m., I am reducing to writing our agreement as you have requested. Airborne Freight Corporation agrees to hire Kevin Tanski as a regular employee provided he passes the pre-employment drug screen. He will not be required to complete a probationary period.

It is also understood and agreed, that as a condition of hiring Kevin Tanski, you will go forward with the ratification vote this Sunday, December 17, 1995 and that the contract is ratified at this meeting. [G.C. Exh. 5.]

Shortly after receiving this letter, Theodus faxed the following reply to Parson:

Please be advised that in your Fax of 12/15/95 you have erred in regards to a conversation that we had on December 15, 1995.

At NO time did I indicate or imply that the hiring of Kevin

Tanski was in any way related to contract negotiations or contract ratification for the Airborne Office Clerical 407 member.

You had in fact agreed several months ago to hire Kevin Tanski and it was unrelated to the contract then as it is now. [GC Exh. 6.]

Parson did not respond to Theodus' letter. Instead, he sent a copy of his letter to Bill Kowal, DFSM at the Beechwood facility, along with a post-it note that read,

Bill,

¹⁵ Theodus testified that his persistence was due in part to Tanski's persistence in asking him if any progress was being made in getting him a job with the Respondent.

¹⁶ The list is distributed to the local signatories of the NMFA in the area.

Tanski is still out in the cold, we shook him out of the bushes on this one.

Keep this Confidential.....

I guess I'm nuts [GC Exh. 7.].....

Parson also instructed Hearn to hire Tanski as a casual employee. Hearn was told to start processing his application and to set Tanski up for a drug screen.

On December 19, Hearn called Tanski to take a drug screening test. About a week later, Supervisor Casey Gacek notified Tanski that he had passed the drug test and that he would be contacted the following week.

3. The filing of a grievance and the processing of Tanski's application

On December 29, 1995, the Union filed a grievance on behalf of Tanski asserting that by failing to hire Tanski off the preferential hiring list and by hiring eight casual drivers, who were not on the list, subsequent to the date on which Tanski's name was added to the list (September 27), the Respondent violated article 3, section 2 of the NFMA. As a remedy, the Union sought to have the Respondent hire Tanski as a full-time regular employee with a seniority date of October 6, 1995, the first date on which the Respondent hired a casual employee following the date on which the Union submitted Tanski's name to the Respondent as a preferred casual.

About a week later, on January 9, 1996, Gacek called Tanski to come to the Middleburg Heights facility to fill-out some paperwork and take a few tests. As a part of the process, Gacek asked Tanski to sign a letter of understanding as a casual employee. (GC Exh. 42.) When Tanski questioned Gacek about the letter, he was told that he had to sign it if he wanted to work for the Respondent. Tanski signed the letter.

Several weeks later, on February 27, Gacek called Tanski to start work the following day. Tanski testified that when he told Gacek that he needed to give his current employer 2 weeks notice, Gacek said that it was not his problem. Gacek testified that Tanski never mentioned that he needed to give 2 weeks notice. Rather, according to Gacek, Tanski asked if he was going to be working as a part-time regular individual. When Gacek told him, "No," Tanski refused to work as a casual employee. Gacek testified that he called Tanski about other work opportunities as a casual driver, but he always turned the work down. Gacek stated that eventually he stopped calling Tanski. For demeanor reasons, I credit Gacek's testimony on this point.

4. The arbitrator's decision

The Union's grievance eventually proceeded to arbitration. On November 24, 1997, the arbitrator ruled that although the Respondent did not comply with the contract, the Union did not complain about the Respondent's hiring practices before this incident. Thus, the arbitrator found that Tanski was not entitled to the relief requested, i.e., full-time regular employment.

Instead, the arbitrator concluded, in pertinent part, that "an appropriate remedy for the Company's failure to comply with the [contract] is that the Company shall now be required to establish a preferential casual list, and to place grievant on that list with a seniority date of December 29, 1995, the date on which the grievance was filed." (R. Exh. 64(A) (attachment F).

Tanski began working for the Respondent as a casual driver on December 1, 1997. (Tr. 392.)

5. Analysis and findings

a. The agreement to hire Tanski as a regular part-time employee

The complaint alleges, and the General Counsel argues, that since December 15, 1995, the Respondent has unlawfully refused to hire Tanski as a regular part-time driver because of his union activity. At issue is whether the hiring of Tanski as a regular employee was conditioned on the ratification of the clerical agreement. I find that it was not. The unrebutted testimony of Theodus was that he told Parson in November that he would never condition the ratification of a contract on hiring someone. On receiving Parson's December 15 letter by fax, Theodus promptly responded by fax specifically pointing out that at no time during their phone conversation did he "indicate or imply that the hiring of Kevin Tanski was in any way related to contract negotiations or contract ratification." (GC Exh. 6.)

Parson did not reply to the fax and did not dispute Theodus' testimony. At the hearing, he conceded that during the December 15 phone conversation, Theodus did not state that hiring Tanski was a condition for ratification of the contract. (Tr. 56-58.) When asked why he wrote that in his letter, Parson gave an evasive and unconvincing response. (Tr.58.) Having observed Parson testify and having considered his testimony, I find that he was an incredulous witness. In addition to the reasons noted-above, he contradicted himself on several key points. At one point, he disputed the part of Theodus' letter that stated he had "agreed several months ago to hire Kevin Tanski" (Tr. 45), but a few minutes later he testified that putting Tanski on as a regular employee "was not part of our original agreement. to hire Tanski" (Tr. 49.) Also, even though Parson reduced to writing his agreement to hire Tanski as a regular employee, he sent DFSM Kowal a post-it note stating that "Tanski is still out in the cold." When asked to explain what he meant by that comment Parson testified, "As far as I'm concerned Mr. Tanski was still not going to be hired." (Tr. 49.) In other words, notwithstanding his verbal and written representations to Theodus that Tanski would be hired as a regular employee with no probationary period, Parson had no intention of fulfilling the agreement. For these, and demeanor, reasons, I find that Parson was an incredulous witness. I further find that on December 15, 1995, Parson agreed to hire Tanski as a regular part-time employee. (GC Exh. 5; Tr. 29, 43-44.)

b. The General Counsel has met her burden

The next issue is whether the Respondent's failure to comply with the agreement (i.e., to hire Tanski as a regular part-time driver) was unlawfully motivated. For the reasons stated above, I find that the General Counsel has satisfied her burden of showing that the failure to hire Tanski as a regular part-time driver was unlawfully motivated.

Accordingly, the burden shifts to the Respondent to show that Tanski was not hired for legitimate nondiscriminatory reasons or that he would not have been hired even in the absence of his union activity.

c. The Respondent's defenses are unpersuasive and pretextual

The Respondent's affirmative defense as expressed in its brief, pages 28–31, is convoluted and difficult to follow. It is premised on the expectation that the General Counsel will argue “that Airborne did not want to hire Tanski because of his conduct while campaigning for Union office in 1990 and 1993.” (R. Br., p. 28.) While that may have been an unspoken reason for the Respondent's decision to not hire Tanski, it was never a reason stated by the Respondent, and the General Counsel did not solely rely on it in framing its argument. Thus, the underlying premise of the Respondent's defense is faulty.

In addition, the Respondent unpersuasively argues that no violation occurred because it hired Tanski as a casual on January 29, 1996, and because he refused to work unless he was hired as a regular employee. The fact that the Respondent offered Tanski at lesser position at a later point in time may or may not affect the remedy, but it does not negate the violation.

The Respondent further asserts that it would not have hired Tanski as a regular employee in any event because he had been given an unfavorable recommendation by Union Representative Vic Collova. The credible evidence, however, shows just the opposite. Collova testified that he told Hearn that Tanski was a “good worker” and that he was an “excellent worker.” I have credited Collova's testimony and therefore I find that the Respondent's reason is pretextual.

The Respondent also asserts that the allegations of paragraph 7 of the complaint should be dismissed under the Board's *Olin/Spielberg* deferral standard.¹⁷ In *Spielberg Mfg. Co.*, the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. In *Olin Corp.*, the Board further conditioned deferral on whether the arbitrator adequately considered if “(1) the contractual issue is factually parallel to the unfair labor practice issues and (2) [whether] the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.” 268 NLRB at 574. I find that deferral is not appropriate in the present case.¹⁸

First, the agreement and the issue that were before the arbitrator are not the same agreement or the same issue presented in this case. In the arbitration case, the agreement involved was the NMFA. In this proceeding, the agreement is the December 15 verbal agreement to hire Tanski as a regular employee, which was reduced to writing by Parson. Next, the issue in the arbitration case was whether the Respondent breached the NMFA by failing to hire off the Union's preferential casual

hiring list. The issue here is whether the Respondent failed to hire Tanski as regular employee, as per the December 15 agreement, because of his union activity. There is no evidence that the facts surrounding the December 15 phone call were presented to the arbitrator or that the arbitrator was presented with any other facts relevant to determining the subject unfair labor practice. Accordingly, I deny the motion to dismiss based on the Board's *Olin/Spielberg* deferral standard and I conclude that the Respondent has failed to persuasively prove its affirmative defenses.

Accordingly, I find that the Respondent failed to hire Kevin Tanski as a regular part-time employee on December 15, 1995, in violation of Section 8(a)(3) and (1) of the Act.

E. Alleged Violations Concerning Robert Hearn

The complaint contains 47 separately alleged violations of the Act concerning Robert Hearn, a union steward at the Beachwood terminal, in connection with numerous written warnings, six suspensions, and three discharges affecting Hearn during the period of September 28, 1995—January 20, 1998. Counsel for the General Counsel takes the position that the Respondent took these actions against Hearn in retaliation for his union activity and in order to harass him so that he would cease engaging in such activity. The Respondent argues that Hearn was an insubordinate and defiant employee with an absenteeism and tardiness problem, who refused to follow rules and policies, and therefore his discipline was warranted.

1. Background

Charging Party Bob Hearn was a union steward at the Beachwood terminal since it opened in 1991. Before that, he was a union steward at a terminal known as the “Cleveland station.” Hearn made sure that the terms of the collective-bargaining agreement were followed by both management and the drivers. He sought to ensure that work practices agreed upon during the tenure of past DFMSs survived the transition from one DFMS to another. But dealing with management and the drivers, Hearn often was caustic, intimidating, and profane.

Hearn also had a less than satisfactory work performance history. Starting in the mid-1980's, he received several warnings for tardiness and absenteeism. In 1989, he was cited for being insubordinate toward a supervisor, who approached Hearn about using the radio in his truck while on route to the station to solicit grievances from other drivers. (R. Exh. 25.) On another occasion, Hearn received a warning after a customer complained about his flippant attitude (R. Exh. 26), and on another occasion he was warned about misusing company time (R. Exh. 28). In March 1994, Hearn was discharged after failing to notify the Respondent that his driver's license had been suspended and for operating company vehicles and equipment during the suspension period.¹⁹ (R. Exh. 32.)

In July 1994, William Kowal became Beachwood DFMS, replacing Tom Hearn who became the Middleburg Heights DFMS. Kowal was an exarmy officer, educated at the United States Military Academy. He strived to operate the terminal efficiently by adhering to corporate standards and policies and

¹⁷ *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

¹⁸ On April 20, 1998, the Board denied the Respondent's prehearing motion to dismiss par. 7 of the complaint, with leave to renew its motion to the administrative law judge hearing the case after the presentation of evidence. (GC Exh. 158.) The Board specifically stated that “[t]he issue presented to and considered by the arbitrator, whether by hiring casuals not on the Union's list the Employer violated the provisions of the NMFA, does not appear to be factually parallel to the complaint allegation that the Respondent refused to hire Tanski because of his union activities.” At the end of the hearing, the Respondent renewed its motion.

¹⁹ After a hearing on a grievance filed by Hearn, the discharge was reduced to a 4-week suspension. (Tr. 632.)

by identifying and improving areas out-of-compliance with those standards. Unlike his predecessor Tom Hearn, who also sought to improve the operation of the terminal, Kowal had his own way of doing things and was not interested how things were done in the past. (Tr. 414.) His management style was cut and dry. The drivers would do what they were told if they wanted to work for the Respondent or else they would be disciplined. (Tr. 1359–1360, 222.)

Between June 1994, the time Kowal became the Beachwood DFSM, and September 1995, Bob Hearn was disciplined on several occasions.²⁰ He was disciplined for failing to download his scanner properly (R. Exh.36), excessive tardiness (R. Exh. 37), instructing drivers to slow down and delay completing their assignments (R. Exh. 38), working over 60 hours in 1 week (R. Exh. 40), calling a supervisor a “f—in’ puke” (R. Exh. 41), and while on the road, flipping the finger to a lady driver, who reported the incident. (R. Exh. 42.) He also was suspended on August 30, 1995, for referring to the Beachwood managers as “assholes.” (R. Exh. 44.) The evidence therefore paints a picture of Hearn as a less than courteous and deferential driver, who happened to be the union steward²¹

2. The alleged threat to suspend and suspension

a. Facts

The a.m. sort generally occurs between 7–8:15 a.m. each day. It is a crucial time period in which freight is sorted and loaded on the trucks for delivery within rigid deadlines. Immediately upon completion of the a.m. sort, drivers are required to close their truck doors, leave the terminal, and begin delivering their routes.

On September 28, 1995, Hearn was on the dock 30 minutes after his a.m. sort ended. As he was preparing to leave the Beachwood terminal, driver Rita Ineman approached him about a grievance she had filed. Ineman asked Hearn if her grievance had been sustained. Hearn explained that she had won the grievance. Walking toward their trucks the two drivers continued discussing the grievance, when they encountered DFSM Kowal, who cautioned Hearn about discussing union business on company time. Hearn testified that he responded to Kowal, “well, whatever Bill,” which made Kowal angry. According to Kowal’s un rebutted testimony, it was well past the time for both drivers to have been on the road when he saw Hearn talking to Ineman on the dock. Kowal told Hearn that he was taking too much time to get off the dock and that he was going to write him up. Kowal credibly testified that Hearn flippantly told him that since he had been written up for everything else Kowal might as well write him up for this. (Tr. 416.) Hearn also laughed in Kowal’s face.

In late September 1995, Hearn learned that some of the supervisors were placing labels, envelopes, and other supplies in trucks at the end of the workday. Concerned because they purportedly were performing driver’s work, he approached Kowal on the dock about the matter. According to Hearn, he had a prior understanding with Kowal that the drivers would be al-

lowed adequate time to resupply their own trucks. Hearn testified that when he reminded Kowal of their prior agreement, Kowal told him to file a grievance. Hearn further testified that Kowal stated that he was going to do whatever it took to keep his job and if Hearn wanted to get cut throat about it, he would begin writing up all the drivers. (Tr. 414.)

Later that day, Hearn was suspended for 5 days for stealing company time by socializing on the dock after the a.m. sort had ended and for laughing off Kowal’s directive to get on the road.²¹ (GC Exh. 43.) Hearn filed a grievance.²² (GC Exh. 44.)

b. Analysis and findings

1. The alleged unlawful threat

In paragraph 6(A) of the complaint the General Counsel asserts that Kowal unlawfully threatened to discipline Hearn for talking to Ineman about union matters in violation of Section 8(a)(1) of the Act. The undisputed evidence shows that the Respondent has a legitimate policy prohibiting union stewards from conducting business during the a.m. sort and that Hearn was aware of the policy.²³ It also shows that Hearn and Ineman were talking on the dock 30 minutes after the a.m. sort ended at a time when they should have been on the road. Even though Kowal assumed that Hearn was discussing union business,²⁴ the un rebutted evidence shows that he told Hearn that he was going to write him up for taking too much time on the dock. I therefore find that Hearn was not engaged in protected union activity and that Kowal did not threaten to discipline him for discussing Ineman’s grievance. Rather, I find that Kowal was justified in warning him about being on the dock long after the a.m. sort ended. Thus, I find that Kowal’s remarks did not interfere with a right protected by the Act.

Accordingly, I shall recommend that paragraph 6(A) of the complaint be dismissed.

2. The alleged unlawful suspension

The paragraph 10(A) of the complaint asserts that the Respondent suspended Hearn on September 28, 1995, in order to harass him and retaliate against him because of his union activities in violation of Section 8(a)(3) of the Act. The countervailing evidence shows, however, that in addition to the aforementioned policy about conducting union business during the a.m. sort, which Hearn knew about, the Respondent had disciplined other drivers for socializing during the a.m. sort. Thus, the evidence shows that the Respondent disciplined Hearn for a legitimate nondiscriminatory reasons.

²¹ Under the NMFA, except in a case of “cardinal infractions,” a driver who is discharged or suspended “is allowed to remain on the job until the discharge or suspension is sustained under the grievance procedure.” (Jt. Exh. 1 at 158, 207.)

²² The record does not disclose how the grievance was ultimately resolved.

²³ Union stewards are provided time to investigate grievances and take care of union business after they have completed their routes and often are paid overtime for doing so. (Tr. 1365.)

²⁴ Kowal testified that he did not know and could not hear what Hearn and Ineman were discussing.

²⁰ None of this discipline is the subject of any allegation in the complaint nor does the evidence show that Hearn filed any charges with the Board concerning the discipline during this period.

Accordingly, I shall recommend the dismissal of paragraph 10(A) of the complaint.

3. The alleged unlawful surveillance

Paragraph 6(B) of the complaint in effect alleges that on September 29, 1995, DFMS Kowal and Supervisor Mitchell engaged in surveillance of Hearn because of his union activities. Hearn testified that after completing his a.m. sort on September 29, 1995, the day after Kowal told him he was going to be written up for leaving the terminal late, he went to the bathroom to wash up before starting his route. On his way to the bathroom, he noticed Kowal and Mitchell were following him. When he came out of the bathroom, Kowal and Mitchell were standing 50–56 feet away watching him. Nothing was said to Hearn, who went to his truck and left.

Although Kowal and Mitchell he did not recall the incident (Tr. 1366, 1480), I find that find no violation occurred because there is no evidence that Hearn was engaged in union activity. Counsel for the General Counsel falsely assumes that because Hearn was a union steward, everything he did constituted union activity. There is no evidence that he was conducting union business on his way to the bathroom. Moreover, the evidence shows that Kowal and Hearn did nothing more than observe him during working time walking to and from the bathroom. Even where employees have been actually engaged in open union activity on or around the employer's property, the Board has held that the mere observation of that activity by the employer does not constitute unlawful surveillance. *Multimatic Products*, 288 NLRB 1279 (1988).

Accordingly, I shall recommend that the allegations of paragraph 6(B) of the complaint be dismissed.

4. The unlawful threat to discipline drivers

Paragraph 6 (C) effectively alleges that in October 1995 Kowal threatened Hearn with unspecified reprisals and threatened to write up other employees because of Hearn's union activities. According to Hearn, he approached Kowal seeking a clarification of work rules. Hearn testified that when he asked Kowal to specify which work rules applied, Kowal responded, "[T]he work rules are whatever I or my supervisors say it [sic] that day." (Tr. 421.) Hearn testified that he responded by asking, "How are they supposed to know, you know, how are they supposed, you know, know what they're being disciplined for...we have to file grievances." Hearn stated that Kowal replied, "Bob, go ahead and file your grievances. We'll still see who has a job, we'll let, let the best man win." (Tr. 421.)

Kowal did not deny making the statement to Hearn. Rather, he did not recall having this specific conversation with him. (Tr. 1366.) In a generalized answer, he testified that "we've had conversations where I informed Mr. Hearn that the company had a right to establish reasonable type work rules and that if the union was in disagreement with it that he had a right to file grievances . . . Mr. Hearn did not agree with the policies that we were implementing. And . . . I told him "Then you need to file grievances, because the policies will be implemented." (Tr. 1366–1367.) Kowal's testimony is unpersuasive and evasive. For demeanor reasons, I credit Hearn's testimony on this point. I also find that, under these circumstances, the remarks attrib-

uted to Kowal by Hearn constitute an unlawful threat which was intended to restrain or coerce Hearn from filing grievances and which suggested that the Respondent would retaliate if he did so.

Accordingly, I find that Kowal violated Section 8(a)(1) of the Act as alleged in paragraph 6(C) of the complaint.

5. The October 30, 1995 warning

The Respondent's trucks have a six-digit identification code, which the drivers are required to enter into their bar code scanners to enable the Company to track driver activity while on route. The code can be entered by either manually typing in the truck number or scanning the bar code on the door of the truck. On October 24, 1995, Supervisor Douglas Downing advised Hearn that he had entered only four of the six-digit truck number into his scanner. Two days later, on October 26, Hearn made the same mistake again. By letter, dated October 30, Hearn received a warning for failure to follow instructions.

While Hearn does not deny that he failed to enter the six digit identification code, he unconvincingly testified that he made the same mistake twice because (1) Downing did not explain the first time exactly what he had done wrong and (2) he did not realize until much later that each truck had a six digit, rather than a four digit, code that had to be entered. Downing credibly testified that he "had told him [Hearn] on previous occasions that he should (sic) use the six digit vehicle number instead of the four digit." (Tr. 1242.) The evidence also reflects that Hearn had correctly entered the truck number immediately prior to and after these incidents, which supports a reasonable inference that he knew the correct procedure. His explanations are therefore unpersuasive. Finally, the evidence shows that other drivers had likewise been disciplined for improperly scanning packages.

Thus, the evidence reflects that Hearn would have been disciplined, even in the absence of his union activity. Accordingly, I shall recommend the dismissal of paragraph 10(B) of the complaint.

6. The October 30, 1995 suspension and November 1, 1995 warning

The Respondent uses a method to sort packages where if a package passes by a driver on the sort line, another driver down the line will intercept it, and pass it back up the line. By letter, dated October 30, 1995, Supervisor John Mitchell suspended Hearn for 1 day for throwing packages to other trucks. (G.C. Exh. 48.) Mitchell testified that he noticed packages piled up by Hearn's truck and asked him twice to pass them down the line. Hearn began lifting the packages over his head and throwing them to other trucks.

Hearn testified that he was scanning letters with his back to the conveyor belt when Mitchell asked him to pass the packages along. After he finished scanning the letters, he tossed the packages to the back of the trucks where they belonged. (Tr. 430–433.) Hearn denied throwing the packages from over his head. He testified that at no time did Mitchell tell him to stop throwing the packages. Mitchell conceded that it is not uncommon for drivers to toss packages, but testified that they typically do not lift them above their heads to toss them. For demeanor reasons, I credit Hearn's version of what took place.

There is no evidence that the boxes or their content were damaged. There is no evidence that any other driver has been disciplined for throwing boxes up the line. In the absence of any evidence that other drivers who have thrown boxes have been similarly treated, I find that the Respondent unlawfully suspended Hearn on October 30, 1995, in violation of Section 8(a)(3) of the Act.

The next day, October 31, 1995, Supervisor Mitchell conducted a routine inspection of Hearn's truck, which resulted in a warning letter, stating that "there was trash on the floor and the overall appearance was not within the image standards." Hearn essentially denied that there was trash on the floor of his truck. Instead, he testified that he kept all of his trash in a waste paper basket inside his truck. He also testified that he had heard of, but had not seen, the "image" standards that Mitchell referred to. (Tr. 436.) For demeanor reasons, I do not credit his testimony of this point.

The evidence shows that the Respondent had a published policy concerning image standards, which emphasized the importance of keeping trucks clean. It also shows that a year earlier, on or about November 10, 1994, Mitchell gave Hearn a verbal warning for, among other things, failing to keep "the interior of your vehicle . . . free from trash." (R. Exh. 35.) The evidence also shows that other drivers have been disciplined for failing to clean their trucks clean.) For these, and demeanor reasons, I do not credit Hearn's testimony that there was no trash on the floor of his truck. Thus, I find that the evidence shows that the Respondent would have disciplined Hearn, even in the absence of union activity.

Accordingly, I shall recommend the dismissal of paragraph 10(D) of the complaint.

. The November 15, 1995 warning

On November 15, 1995, Supervisor Downing gave Hearn a warning for being tardy 16 times since the beginning of the contract year in violation of the Beachwood terminal attendance policy. Hearn did not deny that he had a tardiness problem and he did not file a grievance disputing the warning. Rather, he testified that by virtue of his union steward position, he was aware of three other drivers, with worse tardiness records, who were not disciplined, i.e., Bob Dambrowski, Mike Montinero, and Greg Spada. The implication is that employees who were not active in the Union were treated differently.

Contrary to Hearn's assertions, however, the evidence shows that Montinero and Spada received warnings for tardiness on the same day as Hearn, and that all three drivers, Dambrowski, Montinero, and Spada, had previously received warnings for tardiness on February 10, 1995. (R. Exh. 16.) The evidence also shows that Hearn had a severe tardiness problem which predated the arrival of Kowal as DFMS at Beachwood. (R. Exh. 21.) Thus, the evidence shows that Hearn was disciplined in a manner similar to other drivers with a tardiness problem. I therefore find that Hearn the Respondent would have disciplined, even in the absence of his union activity.

Accordingly, I shall recommend the dismissal of paragraph 10(E) of the complaint.

8. The November 28, 1995 suspension

By letter, dated November 28, 1995, Supervisor Mitchell suspended Hearn for 2 weeks for socializing on the dock and insubordination. (G.C. Exh. 53.) After loading his truck that morning, Hearn started for the bathroom, when another driver asked him if he had an extra scanner holster. Hearn responded, "Yes," and started back to his truck. At that point, he was met by another driver, who began asking him questions.

From the other side of the belt, Mitchell saw the drivers talking with Hearn. Mitchell shouted if your truck is loaded, "get out and down the road." (Tr. 445.) The un rebutted evidence shows that the drivers were late getting off the dock. (Tr. 1494, G.C. Exh. 53.) Hearn testified that he told Mitchell that he was getting an extra scanner holster and that he had to go to the bathroom. When Mitchell asked Hearn what he had muttered, the undisputed evidence shows that Hearn replied, "[D]on't worry, you'll get yours." (Tr. 1495, 446.)

The General Counsel argues that Mitchell gave Hearn the suspension letter to discourage him from engaging in union activity in violation of Section 8(a)(3) of the Act. She asserts that the Respondent wanted to show Hearn that he was being watched and that he would not be permitted to converse with other drivers. As noted above, the Respondent has a reasonable policy prohibiting union steward from conducting union business during a.m. sort. Although there is no evidence that Hearn was conducting union business, or that Mitchell suspected him of doing so, Mitchell appropriately advised the drivers to leave the facility.

The un rebutted evidence shows that Hearn left the dock 23 minutes late on November 23. It also shows that before suspending Hearn, Mitchell told him to download his scanner, close his truck doors, and depart the facility after the last piece of freight passed his truck. Hearn instead chose to provoke Mitchell by effectively threatening him. The Board has held that even where, unlike here, active union supporters are engaged in protected conduct, they are not insulated from discipline if they are insubordinate and make threatening comments to a supervisor. *Schwebel Baking Co.*, 306 NLRB 111, 114-116 (1992).

Accordingly, I shall recommend the dismissal of the allegations of paragraph 10(F) of the complaint.

9. The November 29, 1995 suspension

The next day, November 29, 1995, Hearn was on his way to the bathroom again, after loading his truck, when he came upon two drivers having an argument about whether a casual driver should be given some of the overload work of one of the drivers. Hearn overheard the argument and cautioned one of the drivers about assigning the overload work. Specifically, he pointed out that the Respondent has been giving drivers warnings for directing the work force. He also recommended that they go see a supervisor to decide the matter. Hearn testified that one of the drivers yelled at him, "You don't tell me what to do." Hearn responded, "I'll tell you what to do, I'll tell you after work." (Tr. 449.)

By letter, dated November 29, Supervisor Downing suspended Hearn for directing the work force and threatening a fellow employee. The suspension letter states, "[P]rior to de-

parting the station after the morning sort, the undersigned overheard you shouting at a fellow employee. As I approached, I heard this employee exclaim that you could not tell him what to do. To this you responded, "I'll tell you what to do after work." (GC Exh. 54.) The letter further states. "[T]he undersigned, as well as the additional supervisor, interpreted this to be a threat of violence to this employee. This type of threat will not be tolerated."

Counsel for the General Counsel argues that Hearn was suspended for fulfilling his union steward duties by breaking up an argument between unit employees. The argument is not persuasive. First, it's questionable whether that is the union steward's job to break up arguments among employees. Even if it was part of his union steward's job duties, the evidence shows that Hearn after interjecting himself into the controversy, Hearn became part of the dispute, rather than resolving the dispute. When Downing came upon the scene, he heard one driver yelling at Hearn, "You don't tell me what to do," whereupon Hearn replied, in a threatening tone, "I'll tell you what to do, I'll tell you after work."²⁵ Downing therefore concluded that Hearn was attempting to direct a driver and that he then threatened the driver who resisted Hearn's intervention. The evidence also discloses that the Respondent has disciplined other drivers for directing the work force. Thus, I find that the Respondent would have disciplined Hearn even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraph 10 (G) of the complaint be dismissed.

10. The December 1, 1995 warning

Supervisor Downing testified that on December 1, 1995, he was walking along the conveyor belt when he heard Hearn complaining aloud that a black female driver had used his truck and failed to refuel it. According to Downing, Hearn made a sexually degrading remark about the female driver referring to her as that "little black bitch" and that "f—k-in Doris Ellis." (Tr. 1247, R. Exh. 55.) As a result, he gave Hearn a warning letter dated, December 1, 1995 (G.C. Exh. 55), for making a sexually degrading remark about a fellow driver.

Hearn denied ever calling the black female driver a sexually degrading name or accusing her of failing to refuel his truck. He asserts that no one in management talked to him about the incident and that he did not find out why he received the warning until the local grievance hearing. For demeanor reasons, I do not credit his testimony on this point. The evidence also shows that Hearn had a proclivity for using profanity and making derogatory remarks. (Tr. 467-470, GCExh. 41, 44.) The evidence also shows that the Respondent has a policy against sexual harassment and that it has disciplined other employees for using profanity and for making what might be considered sexually harassing remarks. (R. Exh. 56 at 18.) The fact that the Respondent did not discuss the incident with Hearn before issuing the warning does not alter my conclusion because the evidence reflects that it was not the Respondent's practice to discuss discipline in advance with any of its drivers. Thus, I

find that Hearn would have been disciplined by the Respondent even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(H) of the complaint be dismissed.

11. The January 15, 1996 warnings

Paragraph 10(I) aspect on January 15, 1996, Hearn received two warning letters because of his union activity.

a. Failure to call-in a pickup

On January 15, 1996, Hearn received a written warning and a suspension letter. The warning letter involved the failure to call-in a pickup on January 13, 1996.

On Friday, January 12, 1996, an airplane arrived late due to inclement weather, which increased the volume of freight that had to be delivered on Saturday, January 13. Extra drivers, called-in on a seniority basis, were told to divide their freight and to leave behind the packages that they would be unable to deliver. According to Hearn's un rebutted testimony, when he attempted to leave behind some freight bound for Chagrin Falls, Supervisor Downing told him to take all of his freight on the road with him. Downing told Hearn that another driver would be dispatched to pickup and deliver the Chagrin Falls freight while Hearn was on route.

As the day went on, Hearn periodically radioed Downing about the Chagrin Falls freight. Hearn testified that he was concerned about exceeding the maximum number of hours a driver is permitted to drive in a week by the U.S. Department of Transportation. Unable to find another driver to do the Chagrin Fall run, Downing told Hearn to bring that freight back to the facility, which he did.

By the time Hearn reached the facility, Downing had left for the day and Supervisor John O'Connor had replaced him. Hearn returned the Chagrin Falls freight to O'Connor and told him that there also was a pickup that had to be made.

On Monday, January 15, O'Connor gave Hearn a warning letter because he did not advise him of a call-in pickup until Hearn returned to the facility. The failure to call-in the pickup left insufficient time to make the pickup before the customer's business closed. Specifically, the warning letter stated,

You contacted dispatch and informed the undersigned that you would be bringing back a number of Saturday deliveries but made no reference about the pick-up. You returned to the station at 1525 and informed me that you did not pick this up—the call in had a close time of 1600. Consequently the pick up was missed. [GC Exh. 56.]

The General Counsel argues that Hearn was given the warning to harass him because of his union activity. The Respondent points out, and the evidence shows, that Hearn received the warning for not making the pickup and not advising the supervisor that the pickup had not been made in time to dispatch a driver to do so. Contrary to the impression that Hearn seek to foster (i.e., that he received the warning for not making the deliveries), the evidence show that he was disciplined for failing to make the pickup, and more precisely for failing to alert the supervisor of this fact in a timely manner. The General Counsel does not argue that Hearn was treated differently from other drivers who committed similar infraction. Thus, I find

²⁵ The evidence as a whole supports a reasonable inference that some drivers were intimidated and felt threatened by Hearn. (Tr. 1641, 695.)

that the evidence supports a reasonable inference that the Respondent would have disciplined Hearn even in the absence of his union activity.

b. Instructing drivers not to talk to supervisors

Also, on January 15, 1996, Hearn received a suspension letter for telling three drivers on three separate occasions not to talk to their supervisors. (G.C. Exh. 57.) Supervisor Downing testified that on two or three occasions while he was talking to drivers Hearn walked up, interrupted the conversation, and told the drivers “[d]on’t talk to management.” (Tr. 1240.) Downing further testified that although he asked Hearn not to tell the drivers what to do, Hearn did so anyway. After the third time, Downing issued a suspension letter.

Hearn did not deny telling the drivers not to talk to their supervisors nor did he dispute Downing’s testimony in any other way. He did not testify, nor is there any evidence, that the drivers were discussing union business with the supervisors when he interrupted them. Rather, Hearn sought to explain his inappropriate conduct by stating that from time to time at grievance hearings company officials would comment about remarks made to them by certain drivers. He therefore started telling the drivers not discuss anything with the supervisors except work related matters. (Tr. 464.) Hearn failed to differentiate between telling drivers privately that they should use discretion when talking to supervisors and telling them in the presence of the supervisors that they should not to talk to supervisors. I find that Hearn’s conduct was inappropriate. The evidence shows that the Respondent had previously disciplined another driver for similar conduct. (R.Exh. 56 at 8.) I find that Hearn would have been disciplined for this conduct, even if had not engaged in union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(I) of the complaint be dismissed.

12. The January 17, 1996 suspension

On January 17, 1996, Supervisor Downing gave Hearn another suspension letter for referring to another supervisor in a vulgar and derogatory manner. On Saturday, January 13, while working the a.m. sort, Hearn yelled to Downing asking him if he would be in the terminal when Hearn returned from his route. When Downing told Hearn that he would be replaced by Supervisor John O’Connor, Hearn remarked, “Oh, that fat f--k is gonna be here, huh.” Downing replied, “Excuse, me?” Hearn stated, “That fat f--k.” According to Downing’s un rebutted testimony, the other drivers along the line started laughing, prompting Downing to reply, “If you are referring to John O’Connor, yes, he is the one who will be here.” (Tr. 468, R. Exh. 69.)

Hearn denied that he referred to O’Connor in a derogatory manner. For demeanor reasons, I find his denial to be unconvincing. Hearn also testified that he had overheard other (unidentified) drivers make vulgar and disparaging remarks about supervisors, and that they were not disciplined. (Tr. 468.) He based his assertion on the fact that he receives warning letters in his capacity as union steward and that he never received a copy of any warning letters for these (undisclosed) drivers. His generalized explanation is self-serving. It is also contradicted by the evidence showing that the Respondent had disciplined

Hearn and other drivers for similar infractions prior to this incident. (R. Exh. 13, R. 56.) I therefore find that the Respondent would have disciplined Hearn for this conduct, notwithstanding the fact that he was a union steward.

Accordingly, I shall recommend that the allegations of paragraph 10(J) of the complaint be dismissed.

13. The unlawful route changes

Paragraph 10(K) of the complaint alleges that on January 15 and 20 and February 3, 1996, the Respondent violated Section 8(a)(3) of the Act by assigning Hearn more onerous routes because of his union activity.

a. Splitting Hearn’s route

Hearn had been assigned to the Painesville route (PV-1) for almost 2–1/2 years. It consisted of a heavy concentration of short stops in a business square and shopping area, as well as less concentrated stops in a rural area. In November 1995, a driver told Hearn that he had seen a map in the dispatcher’s office showing changes to the PV-1 route. When Hearn asked Mitchell if his route would be changed, Mitchell told him there was no plan to do so.

The following Monday, December 4, Supervisor Stan Parulis told Hearn that the Respondent had been divided route PV-1 so that Hearn had the rural part of the route, which became the new PV-1 and another driver was given the business square and shopping area, which became PV-3.²⁶

According to the un rebutted testimony of DFMS Kowal, the Respondent had received several customer complaints about the service on route PV-1. Packages were not being delivered by 12 noon and other packages were being returned to the facility undelivered at the end of the day. (R. 75.) Kowal decided that the area was too large for one driver and that he decided to split the route in an effort to improve service. Kowal testified, however, that after the route was divided, Hearn’s “performance level actually decreased by half.” (Tr. 1380.) According to Kowal, “after we cut his territory down by half, he was doing 8.29 stops an hour. Prior to that, when he had a much larger territory, and a much greater distance to travel, he was doing 11.74 stops an hour.” (Tr. 1389, R. 75 at 25.) Kowal pointed out that after the split, Hearn was making less stops in a smaller area, but was still working the same number of hours. (Tr. 1393–1394.) Kowal further asserted, and Hearn did not dispute, that after another full-time employee took over part of Hearn’s route, Hearn simply slowed down and continued to provide the same level of service. The un rebutted testimony of Kowal also shows that Hearn took the position that “the contract said that we couldn’t enforce any type of productivity standards upon him and he could work as fast or slow as he wanted.” (Tr. 1389–1390, 1392.)

b. The January 15, 1996 route change

One month later, on January 15, 1996, Supervisor Stan Parulis informed Hearn that he was being transferred from new

²⁶ The complaint does not allege, nor does the General Counsel argue, that this route change was motivated by antiunion animus.

route PV-1 to route Cleveland 4 (CL-4).²⁷ The following day, Hearn asked Kowal why his route had been changed. When Kowal told him that it was to better serve the customer, Hearn opined that it was in retaliation for his union activity.

Hearn testified that the CL-4 route was less desirable because it was in a high crime area, it was difficult to deliver because of congestion and because it required many signatures, and because there was no place to take breaks. (Tr. 459.) The Respondent does not dispute that the CL-4 route was more onerous than the PV-1 route. Although ample evidence exists that Hearn's work performance on PV-1 after the route split did not meet expectations, the Respondent did not explain why Hearn, who was first or second in driver seniority, was assigned to the CL-4 route. In its posthearing brief at page 60, the Respondent completely glosses over Hearn's un rebutted assertion that route CL-4 was less desirable because of high crime, congestion, numerous signatures, and no place to take breaks. In the absence of any evidence or argument explaining why one of the most senior drivers was assigned to the less desirable CL-4 route, I find that the Respondent has failed to satisfy its *Wright Line* evidentiary burden.²⁸

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by transferring Hearn to the more onerous CL-4 route on January 15, 1996.

c. The January 20, 1996 reassignment

For several years, Hearn had been the Saturday driver for the Solon, Aurora, Chagrin Falls, and Bentleyville, Ohio routes. On Saturday, January 20, 1996, Supervisor Robert Culkar told Hearn he had a "special assignment" for him. He assigned Hearn to a route covering the lower end of Beachwood and parts of Cleveland. According to Hearn, who was first or second in seniority, this type of route was usually assigned to the drivers with the lowest seniority. Hearn also testified that the route was less desirable because it covered a more congested, high crime area, with no place to make bathroom and break stops.

Hearn's testimony concerning the reassignment is largely un rebutted. Culkar could not recall reassigning Hearn on January 20 or commenting about a "special assignment." There is no evidence contradicting the assertion that the routes assigned to Hearn on January 20 were typically assigned to drivers with the lowest seniority.²⁹ Unlike the PV-1 route split, the Respondent offered no explanation or evidence for reassigning Hearn on Saturday, January 20.

In the absence of any explanation for reassigning Hearn to a different route on Saturday, January 20, I find that the evidence supports a reasonable inference that Hearn was reassigned to a more onerous route on Saturday, January 20, be-

cause of his union activity in violation of Section 8(a)(3) of the Act.

d. February 3, 1996

The undisputed evidence shows that on Saturday, February 3, 1996, Hearn again was assigned to the CL-4 route.³⁰ The Respondent does not address this aspect of paragraph 10(K) in its posthearing brief. As previously determined, route CL-4 was more onerous in terms of high crime and other factors. In the absence of any explanation for this route change, I find that the Respondent has failed to satisfy its *Wright Line* evidentiary burden.

Accordingly, in light of all of the above, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 10(K) of the complaint.

14. Unlawfully requesting Hearn to complete certain work

On Friday, January 26, Hearn returned undelivered freight to the facility at the end of the day. The next day, Saturday, January 27, Culkar told him to deliver freight he had brought back with him the day before. According to Hearn, Culkar told him this was a "special route" and then walked away laughing. (Tr. 473-474.)

Hearn testified that undelivered freight brought back on Fridays is usually held for delivery on Monday, unless a customer calls for the package or unless the package was delayed because it did not arrive for the Friday a.m. sort, and therefore could not be delivered on time. (Tr. 474.) Culkar did not remember instructing Hearn to deliver freight returned on Friday or laughing after doing so. (Tr. 1163.) He testified that he only supervised Hearn on Saturdays and therefore he would not even know what his prior day route was because "Saturday is like a separate day for Airborne. What we do Monday through Friday is completely separate on Saturday." (Tr. 1163.) Culkar effectively corroborated Hearn's testimony that drivers typically are not required to deliver undelivered Friday freight on Saturdays.

Even though Culkar could not recall the incident, the Respondent essentially acknowledged that it occurred in its posthearing brief at page 59, fn. 31. However, the Respondent did not dispute the evidence that the assignment was unusual.

Thus, the evidence, viewed as a whole, supports a reasonable inference that Hearn was singled out for his union activity, and that the Respondent has failed to show that, but for Hearn's union activity, he would have been required on Saturday, January 27, to deliver the freight left over from the previous day. Accordingly, I find that the Respondent unlawfully discriminated against Hearn by requesting him to complete work he had not finished the previous day.

15. The January 27 and February 6, 1996 termination

a. The annual east-west bid

Every year in late December, the drivers are provided the opportunity to transfer from the Middleburg Heights to the Beachwood facility or vice versa by bidding on available start times. In late December 1995, when the Respondent posted the

²⁷ At the same time, alternate union steward Jon Krokey was transferred to route CL-5.

²⁸ I decline to find a *de minimis* violation because the route change did not result in a loss of pay or overtime hours as suggested by the Respondent in its posthearing brief at p. 60, fn. 3.

²⁹ On the other hand, the evidence shows that the reassignment did not result in any reduction of hours or loss of pay for Hearn.

³⁰ It is unclear whether Hearn spent the day delivering undelivered packages that he returned on Friday. Notably, he testified that from that point forward his Saturday route was changed. (Tr. 490.)

1996 annual bid, the posted start time was changed from 6:30 to 7 a.m. The day after the bid took effect the Respondent changed the start time back to 6:30 a.m.

On or about the last week in January 1996, Hearn told Union President Theodus that the Respondent changed the start time. Theodus told Hearn that the bid had to be reposted. The next day, Hearn told Mitchell about his conversation with Theodus, and requested that the annual bid be reposted. Mitchell stated that he would have to send Kowal an e-mail.

b. The January 29 termination letter

A few days later, on January 29, 1996, Culkar issued a letter of termination to Hearn for referring to a supervisor in a vulgar and derogatory manner. The evidence shows that after Culkar changed Hearn's route on Saturday, January 20, Hearn went to Culkar's office to find out what was behind the change. Hearn told Culkar, "This is a private conversation, I just want to know what was going on." (Tr. 479.) He then said to Culkar, "That big goofy f--k," referring to Bill Kowal, "he has this place a mess," he has "this whole terminal is turned upside down." On January 29, around the time that Hearn pointed out that the east-west bid had to be reposted, he received a termination letter for using vulgar language.

Hearn testified that he did not give much thought to his comment because he thought his conversation with Culkar was "private." Culkar did not dispute Hearn's testimony that their conversation was "private." Nor did he explain why he waited 9 days or until after Hearn asked for the reposting of the 1996 annual bid to issue the termination letter. Hearn filed a grievance.³¹

The Respondent asserts in its posthearing brief at page 54 that Hearn's discipline for using profane language in conversation with Culkar was justified because the Board has long held that the use of obscenity toward a supervisor on the shop floor is not protected and is subject to discipline. *Marico Enterprises*, 283 NLRB 726, 731-732 (1987). However, the undisputed evidence shows that the comment was not made on the shop floor. Rather, it was made privately in Culkar's office. In addition, the comment was not made directly to Kowal, but in reference to him in what was understood by Hearn and Culkar as a private conversation. Finally, that Culkar waited 9 days or until after Hearn complained about the annual bid in his capacity as union steward supports an inference that the suspension was retaliatory. Thus, I find that the Respondent has failed to show that it would have taken the same action against Hearn in the absence of union activity.

c. The February 6 termination letter

The following week, on February 6, 1996, Union President Theodus and Business Agents Collova and Steve Kerr visited the Beachwood facility. They discussed safety concerns with Hearn, who testified that he had previously discussed the same concerns with Mitchell. These included failing to turn on overhead heaters and standing in water while working on an electric

powered conveyor belt. All four union officials, including Hearn, approached Mitchell about the safety concerns. Theodus told him that he wanted the problems to be fixed.

Later that day, Hearn was radioed to return to the facility. Suspecting that he was going to be disciplined, he phoned Union Business Agent Collova, who told him that he was going to be disciplined for not reporting an accident. When Hearn arrived at the facility, DFMS Kowal gave him a second letter of termination for (1) failing to report an accident that occurred on December 8, 1995 (G.C. Exh. 62), and (2) because of his overall work record.

Regarding the accident, the evidence shows that on December 8 Hearn thought he had taken his truck out of gear after coming to a stop. When he reached for a package, the truck rolled into a customer's garage door, leaving a small crack in the lower panel. The undisputed evidence also shows that after Hearn inspected the damage he left a note, along with his name and phone number, telling the customer to call to report the damage. Hearn testified that because he was out of radio range he stopped at a pay phone to report the incident to Supervisor Parulis. According to Hearn, Parulis told him not to worry about it and nothing else happened until February 6.

When Hearn got the termination letter on February 6, he told Kowal that he had reported the accident to Parulis and showed Parulis his notes indicating that he had called in the accident. Hearn testified that Parulis did not deny receiving the call, but implied that he may not have recorded the report because it was on a Friday and he was trying to go home. (Tr. 487.) Parulis did not testify at the hearing and the Respondent did not offer any explanation for his failure to appear. It is well settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. Indeed, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *Jim Walter Resources*, 324 NLRB 1231, 1233 (1997). Such an adverse inference is warranted here, where the Respondent has not indicated that Parulis is no longer employed as a management official.

Kowal testified that the customer reported the damage to a supervisor in late January-early February and provided a copy of the note left by Hearn. Kowal also testified that Hearn told the customer that he would take care of it, but he did not. A search was made of the Respondent's records for an accident report, but none was found. Kowal testified that a driver is required to fill out a report for every accident and the failure to do so warrants discharge without prior warning under the NMFA. (Jt. Exh. 1 at 158.) Kowal also stated that prior to making the decision to discharge Hearn, he polled all the supervisors to see if Hearn reported the accident to them, but none, including Parulis, remembered Hearn doing so. Kowal testified that after Hearn told him he made a report with Parulis, he did not go back to Parulis to confirm this statement because Parulis already told him no report was filed. Kowal testified that based

³¹ Hearn's grievance concerning the January 29 termination was considered along with and as part of another grievance, discussed below, that he filed concerning his February 6 termination based on his overall work record.

on this incident, as well as Hearn's overall work record for the previous 9 months, he decided to terminate Hearn's.³²

Hearn's filed a grievance stating that he immediately reported the accident to Supervisor Parulis and that he left a note at the scene. Because the discharge was based on (1) a "cardinal" infraction, warranting Hearn's removal from work, and (2) his "overall work record" which is not grounds for removing him from work, the cases were bifurcated. A grievance panel sustained his grievance on the failure to report the accident and therefore Hearn's was reinstated with full backpay and benefits.³³ (R. Exh. 65(A), attachment F, pp. 27-28.) One year later, on or about May 15, 1997, another separate joint state grievance panel considered his discharge based on his overall work record, including the January 29 termination on or about May 15, 1997, and reduced the discharge to a 5-day suspension.

The Respondent argues that Kowal thoroughly investigated the incident before issuing the discharge and that none of the supervisors who worked on December 8 told him that they had received a verbal report from Hearn's concerning the accident. The un rebutted evidence shows, however, that after Hearn's told Kowal that he reported the accident to Parulis immediately after it occurred, Kowal did not attempt to confirm the information with Parulis. Thus, the evidence supports a reasonable inference that once Kowal had decided to discharge Hearn's, he was not interested in any information which might exculpate him.

The Respondent also argues that Hearn's testimony that he verbally reported the accident to Parulis is uncorroborated and, even if he verbally reported it, he did not follow proper procedures. Hearn's testimony is essentially un rebutted because Supervisor Parulis was not called as a witness. As previously noted, his absence warrants an adverse inference that he would not have rebutted Hearn's testimony. In addition, and contrary to the impression that the Respondent seeks to foster, the NMFA only requires the employee "to report any accident of which the employee is aware" (Jt. Exh. 1, p. 158, 207), which according to the undisputed evidence Hearn's did when he phoned Parulis. The Respondent has not pointed to any documentary evidence requiring the report to be in writing. Thus, the Respondent's reasons for issuing a termination letter do not withstand scrutiny.

Also, the timing of the discharge is suspect. Within hours after Hearn's and the other union officials complained about the safety concerns, Hearn's was called-in off the road, and terminated for something that occurred almost 2 months earlier. Although Kowal testified that the customer did not report the accident until late January-early February, his testimony was unconvincing.

Finally, the Respondent argues that because the Ohio Joint State Grievance Committee found on May 15, 1997, that Hearn's overall work record warranted a 5-day suspension, deferral is appropriate under the Board's *Olin/Spielberg* standards because the unfair labor practice allegations are factually

parallel to the issues considered by the grievance committee (i.e., whether the terminations were justified). The undisputed evidence shows, however, that the January 29 termination, which I have found to be unlawful, was relied on by the Ohio Joint State Grievance Committee as part of the "overall work record" in assessing the penalty of a 5-day suspension. To that extent, therefore, I find that the committee's determination is repugnant to the Act. I therefore decline to defer to the grievance committee's determinations and further decline to dismiss the allegations of paragraphs 10(M) and (N) on this basis. Rather, I find that the evidence viewed as a whole shows that the Respondent's reasons for terminating Hearn's on January 29 and February 6 are pretextual.

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraphs 10(M) and (N) of the complaint.

16. The November 13, 1996 warning

Hearn's returned to work in June 1996, and shortly thereafter he resigned as union steward. Around the same time, July 1996, Kowal was transferred to the Middleburg Heights facility, and Mitchell became DFSM Beechwood. As the evidence below shows, Mitchell suspected that Hearn's was still acting as the unofficial union steward.

By letter, dated November 13, 1996, Supervisor Downing gave Hearn's a warning for violating "Federal DOT policy by working more time than 60 hours during the period November 4 through November 9, 1996." The evidence shows that the letter was rescinded after Hearn's provided Downing with a pay stub showing that he had not worked more than 60 hours during that week. Rather, the undisputed evidence shows that Hearn's had exceeded the 60-hour maximum the previous week and that Downing inadvertently inserted the wrong week in the letter. Another warning was not issued after the error was discovered.

The General Counsel nevertheless argues that had it not been for Hearn's diligence in detecting the mistake he would have received a warning letter that would have been used against him in a future overall work record hearing. The argument ignores the undisputed evidence that Hearn's exceeded the 60-hour maximum in violation of Federal regulations during the prior week which would have warranted discipline, but for the supervisor's inadvertent error.

The fact that the warning letter was rescinded once the error was discovered undercuts an inference that it was issued for an unlawful motive.

Accordingly, I shall recommend that the allegations of paragraph 10(O) of the complaint be dismissed.

17. The alleged November 27, 1996 route change request

Paragraph 10(P) of the complaint alleges that "on or about November 27, 1996, Respondent required Hearn's to request a change of route in writing rather than verbally." Hearn's testimony concerning the circumstances which gave rise to the allegation was very general and vague. He stated that he spoke with "either John Mitchell or Stan (Parulis) or Doug (Downing). It was—those are—I'm not completely sure which supervisor it was." (Tr. 493.) He testified that "usually when there are—there were route—when route changes were made, I would ask if I was also considered." (Tr. 494.) He testified that

³² Because the failure to report an accident is considered a "cardinal infraction" under the NMFA, Hearn's was taken out of work on or about February 6, 1996.

³³ Hearn's was out of work from approximately February – June 1996.

whenever he asked John Mitchell if his route would be changed, he was told to make the request in writing. Hearn said that Mitchell told him that he had to submit a 30-day notice, in accordance with the contract, whereupon the Company would review the hours of the junior driver and the submitting senior driver to determine if a route change was warranted because the junior driver was receiving more hours than the senior driver. Hearn did not testify that he was receiving less hours than a junior driver or that he made a request for a particular route which was denied.

Rather, the evidence shows that the Respondent assigns routes by seniority and ability. Mitchell credibly testified that if a senior driver believed that a junior driver was earning more overtime hours, he could "grieve the other driver's route" by filing a 30-day notice. The Respondent would review the hours of both drivers' routes for 30 days and either switch the routes or making adjustments to enable the senior driver to receive more overtime hours. Mitchell testified, and Hearn confirmed, that Hearn never filed a 30-day notice seeking to grieve a route request. There is no evidence other drivers were granted route changes without filing a 30-day notice. Thus, I find that the Respondent would treat Hearn in the same manner, even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(P) of the complaint be dismissed.

18. The December 13, 1996 warning

On December 12, 1996, Supervisor Joseph George gave Hearn a warning letter for having trash and personal items in his truck. (G.C. Exh. 65.) Hearn asked Mitchell to inspect his truck. Hearn showed Mitchell a waste basket and pair of boots he kept under the seat. That Hearn also showed Mitchell a plastic container in the rear of the truck which contained overalls and gloves. Hearn testified that he could not understand why he received the warning. A few days later, Hearn realized that he had not even used his truck during the 3 days prior to the date the warning letter was issued.

Hearn filed a grievance that was settled at the local level. The warning letter was rescinded, but a notation was made advising Hearn to "Please clean trash in future." Mitchell testified that he approved the rescission.

The General Counsel argues that this incident is another example of the Respondent attempt to harass Hearn in retaliation for his union activity without checking the facts. I disagree. There is no evidence that there was no trash in the truck on the day it was inspected. Rather, the evidence discloses that someone, other than Hearn, had left trash in a truck that he normally used. When it was pointed out that Hearn did not use the truck, the warning was rescinded. The evidence therefore supports a reasonable inference that the warning was not issued for an unlawful motive.

Accordingly, I shall recommend that the allegations of paragraph 10(R) of the complaint be dismissed.

19. The December 18, 1996 forced bid

and the January 14, 1997 route change denial

On December 7, 1996, the Respondent posted the annual east-west bid, which was to remain open for 14 days or until December 21. Hearn had the highest (if not, the next to the

highest) seniority at the Beechwood facility, which meant that when the bidding began, he would be the first or second driver to bid and everyone else would bid afterwards.

On December 18, or 11 days after the bid had been posted, Hearn asked the Middleburg Heights dispatcher, Casey Gacek, "if I was to transfer back to the west side, what area or what route would they give me." (Tr. 499.) Gacek said he did not know and would have to check.

A few hours later, while Hearn was delivering his route, he received a radio call from the Beechwood supervisor, Downing, telling him that "the bid was down to me and I was to bid." (Tr. 499.) Hearn responded that the bidding was not suppose to start for another 3 days or on Saturday, December 21. Hearn stopped at a phone and called Downing, who put Mitchell on the line. When Hearn asked, "Why do I have to bid now...the bid doesn't even start bidding until the 21."³⁴ (Tr. 500.) Mitchell responded, "Well the bid was up for seven days, and that's all I'm required to do." Hearn told Mitchell he would keep his current route under protest and file a grievance on behalf of himself and the other drivers. (G.C. Exh. 68.)³⁴

Mitchell testified that around the time the bid was posted he, Kowal, and Andre Parson decided to move some of the routes from the west side (Middleburg Heights) to the east side (Beechwood) because the latter facility had more space. The routing of freight had to be changed so that freight formerly belonging to Middleburg Heights would be routed to Beechwood. According to Mitchell, "that routing change was going to happen on the first day of the new quarter in January" so it was important to have the manpower lined up to deliver the freight. (Tr. 1503.) Mitchell testified that he was worried that "if we didn't get that bid done concurrently with the freight coming then we'd have all this freight to deliver and no one to deliver it." *Id.* He therefore urged Kowal to end the bidding period early, telling him that the bid had been up for 7 days and that the Respondent did not have any requirement to post the bid for 14 days. Mitchell testified that was the reason the 1996 east-west bid was accelerated.

Although Mitchell's explanation for why the bid was accelerated on its face is convincing, it does not withstand scrutiny when considered in the context of what occurred a short time later. According to Hearn's un rebutted testimony, when the new bid went into effect on January 14, 1997, he asked Mitchell if he could get a new route.³⁵ Mitchell told Hearn that because of "your labor charges," he was under orders to keep Hearn on the same route. (Tr. 504-505, 676-677.) Mitchell admitted "that's pretty much - that's pretty much accurate. I

³⁴ On the same date, Union Steward Phil Castro also filed a grievance alleging that the Respondent violated the NMFA by failing to post the bid in a conspicuous place, by altering and changing start times while the bid was open, by denying senior drivers an opportunity to exercise their seniority, and by changing the posted review time of the bid, thereby forcing the drivers to bid or be passed over. (G.C. Exh. 69.) In late February 1997, the Respondent agreed to re-post the east-west bid in order to settle both grievances.

³⁵ Although Hearn opted to keep the same route on December 18, he did so under protest and with the expectation that the bid would be re-posted, thus allowing him another opportunity to bid a route. (Tr. 677.)

mean I – at this point several charges had been filed.” (Tr. 1513.) Mitchell stated that he was concerned that Hearn would file another charge if he changed his route.

That admission calls into question the true motivation for accelerating the bid. Contrary to Mitchell’s assertions, the bid had been posted for 11 days, and not 7 days, which meant that there were only 3 days remaining in the 14 day posting period, when he decided to “accelerate” the bid on December 18. In addition, Mitchell’s assertion “that [the] routing change was going to happen on the first day of the new quarter in January” is contradicted by the evidence showing that the effective date of the route changes was January 13, 1997 (G.C. Exh. 67). Thus, the evidence supports a reasonable inference that the Respondent gained very little, if anything, by accelerating the bid.

Further, the evidence shows that Hearn would have been able to bid successfully on almost any route between the two terminals. Mitchell testified that in terms of bidding a route Hearn basically had to first decide whether he wanted “to go east or west, and the second decision is once he gets there what position does he want.” (Tr. 1505.) The evidence shows that Hearn was one or two in seniority at the Beechwood facility and 12 or 13 on the master seniority roster out of approximately 160 drivers. (Tr. 1505.) Had he elected to transfer to the Middleburg Heights facility, it is more likely, than not, that he could have successfully bid on a route of his choice. I find that Mitchell sought to make it more difficult for Hearn to bid on another route by accelerating the bid only hours after Hearn asked Supervisor Gacek what route would be available to him if he decided to transfer to Middleburg Heights. I further find that Mitchell’s intent was to preclude Hearn from bidding because Hearn had filed unfair labor practice charges.

Thus, I find that the Respondent’s reason for accelerating the bid is pretextual. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by requiring Hearn to decide prematurely on which route he wanted to bid as alleged in paragraph 10(Q) of the complaint. I further find that the Respondent violated Section 8(a)(4) of the Act by telling Hearn that he could not transfer to another route because he had filed an unfair labor practice charge as alleged in paragraph 6(H) of the complaint.³⁶

20. The warnings of February 1997

On January 29, 1997, Hearn filed a grievance protesting the acceleration of the 1996 east-west bid. Hearn testified that about 2 weeks later, on February 11, Mitchell approached him at his truck and said, “We still know that you’re calling the shots around here” to which Hearn replied, “I’m not the steward.” (Tr. 505-506.) The un rebutted evidence therefore shows that long after Hearn resigned as union steward, Mitchell continued to suspect that Hearn was still serving in that capacity.

³⁶ Par. 6(H) alleges that Mitchell “unlawfully implied” that Hearn was being denied employment benefits in retaliation for his union activity in violation of Sec. 8(a) (1) of the Act. The evidence shows that Mitchell more than “implied” that Hearn could not transfer. Rather, he admittedly told Hearn he would not allow him to transfer to another route because he had filed a charge. I therefore find a violation of Sec. 8(a)(4) of the Act.

On or about February 18, 1997, Hearn received two warning letters. The first warning letter (G.C. Exh. 71) was issued by Supervisor Downing for insubordination by making vulgar and inflammatory remarks to Downing in the presence of another driver. As specifically described in a memo by Downing, dated February 17, 1997 (R. Exh. 70);

On this date, while conducting a conversation with Jim Posipanka, [sic] Mr. Hearn approached us on the towmotor, interrupting our conversation. He began yelling to Mr. Posipanka [sic] to not bother talking to me about anything. He said, “you might as well talk to that f—in’ pole there . . . this asshole doesn’t listen to a f—in’ word you tell him. I told him for the last three weeks to get these f—in’ people out of my way.”

This was in regard to drivers gathering outside the driver room in the morning, supposedly blocking his way while operating the towmotor. This attack was completely unprovoked. I had not even spoken to him yet that morning. It took place at roughly 0700, 15 minutes after his Monday start time.

Hearn denied that the incident ever occurred. He also testified that after he found out the underlying basis for the warning, he went to the other driver and obtained a statement from him saying that it did not happen. (Tr. 507.) Although the General Counsel did not introduce the driver’s statement as an exhibit, it is quoted in Respondent’s Exhibit 65 (F) at page 15 and it tends to support Hearn’s testimony:

I James Pasipanka to the best of my knowledge do not remember ever having a conversation with Doug Downing that was interrupted by Bob Hearn, while using profanity directed toward Doug and having Bob tell me not to talk with Doug.

In addition, a close inspection of the Downing’s memo, dated February 17, 1997, reveals that Downing’s signature was notarized by a notary public on “6-24-97,” which was 5 months after the alleged incident. This evidence supports a reasonable inference that the February 17 memo was not prepared contemporaneously with the event, but was prepared and signed 4 months later. It therefore warrants made less weight in determining the credibility of the two witnesses.

On balance, and for demeanor reasons, I credit Hearn’s testimony that he did not make the inflammatory remarks to Downing which served as a basis for the first warning letter. Thus, I find that the Respondent’s reason for the warning letter was pretextual.

Accordingly, I find that the Respondent violated Section 8(a)(3) by issuing Hearn a warning letter on February 17, 1997, as alleged in paragraph 10 (S) of the complaint.

On February 18, 1997, another supervisor, John O’Connor, issued Hearn a written warning for departing the Beachwood terminal on February 13 with his shirt sleeves rolled-up. O’Connor testified that the Respondent has a policy which requires all drivers to be in complete uniform when they depart for the day. Their shirts must be tucked in their pants and their sleeves cannot be rolled up. They must wear a belt and a jacket. (Tr. 1610.) The evidence shows that Mitchell saw Hearn in the

terminal with his sleeves rolled up and directed O'Connor to issue a warning. (Tr. 510.)

Hearns did not deny that he left the facility on February 13 with his shirt sleeves rolled up. Instead, he testified that he was unaware of the policy before he received the letter. (Tr. 509.) That seems doubtful given the evidence showing that the Respondent implemented an image standard policy on February 22, 1993, and that in August 1993 it began auditing the appearance of pants, shirts, and socks as the drivers left and returned to their facilities. (R. Exh. 4 at FS 060.6–060.7.) The evidence also shows that there had been a prior dispute involving the failure of the drivers to roll up their sleeves before departing, and that they were told that if they put on their uniform jackets before leaving the terminal they would be in compliance with the policy. (G.C. Exh. 74; Tr. 510, 1611.) Hearns stated in his written grievance that he put on his uniform jacket before he started delivering. That statement is un rebutted.

Thus, although O'Connor testified that the decision to render a warning was "cut and dry" (Tr. 1611), the evidence suggests otherwise. While I do not credit Hearns' testimony that he did not know that there was a uniform policy in effect, the evidence supports a reasonable inference that there was some confusion about whether drivers could keep their sleeves rolled up, particularly if they put on their uniform jacket. I find that Mitchell was being "picky" when he instructed O'Connor to give Hearns a warning letter for having his sleeves rolled up in the terminal, particularly in light of the un rebutted evidence that Hearns put on his jacket over his sleeves before he left the terminal. Thus, the Respondent has failed to show that Hearns would have been disciplined even in the absence of his union activity.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act when it gave Hearns a written warning as alleged in paragraph 10(T) of the complaint.³⁷

On February 24, DFSM Mitchell gave Hearns a warning letter for socializing on the dock after the a.m. sort. (G.C. Exh. 76.)³⁸ According to Mitchell, he looked out his office window overlooking the dock at approximately 8:30 a.m., which was after the morning sort, and saw Hearns talking to driver Rita Ineman, who had finished sorting her freight 30 minutes earlier. (Tr. 1515, R. Exh. 78.) Because Hearns had been warned before about promptly leaving the facility after completing the a.m. sort, Mitchell went to the dock to tell both Hearns and Ineman to get out on the road. Hearns testified that when Mitchell told

them to "get on the road," he tried to explain to Mitchell that he was trying to tell Ineman that she misdelivered a package on the Solon route. According to Hearns, Mitchell then stated, "Bob, . . . I've been watching you . . . people are coming to you and asking you questions, as if you're the union steward. You're to tell them that you're not the union steward and you're to get in your truck and leave the terminal." (Tr. 514.)

The General Counsel argues that Mitchell's remarks constitute a threat in violation of Section 8(a)(1) and that in light of Mitchell's comment about being the union steward, the warning letter violates Section 8(a)(3) of the Act. I do not agree. The undisputed evidence shows that Hearns and Ineman were conversing on the dock when they should have been on the road on the way to make their first delivery. Even if they had been discussing union business, which is what Mitchell assumed was going on, Mitchell had the right to tell them to get out on the road in light of the Respondent's policy against conducting union business during the a.m. sort. Thus, I find that the directive to get out on the road was not a threat which interfered with Hearns' Section 7 rights and that the Respondent would have disciplined Hearns, even in the absence of his past union activity. Accordingly, I shall recommend that paragraphs 6(I) and 10(U) of the complaint be dismissed.

21. The April 17, 1997 warning

On April 17, 1997, Supervisor O'Connor gave Hearns another warning letter for having his sleeves rolled up when he entered the scanner room to load his scanner before leaving. (GC Exh. 78.) Hearns testified that he had been putting on his uniform jacket before leaving the facility in accordance with O'Connor's earlier instructions. But O'Connor told Hearns that Mitchell had seen him in the scanner room with his sleeves rolled up and therefore Mitchell told O'Connor to write him up. When Hearns reminded O'Connor that he told him he could keep his sleeves rolled up so long as he put on his jacket before leaving the terminal, O'Connor told him to talk to Mitchell.

According to Hearns' credible testimony, when he questioned Mitchell about being told that it was permissible to have his sleeves rolled up, so long as he put his uniform jacket on before leaving the terminal, Mitchell made light of the situation by stating, "What are you worried about? . . . They're only—only warning letters." (Tr. 517.) Hearns pointed out that the warning letter called for a disciplinary hearing on his overall work record to which Mitchell responded, "At your level of discipline, everything will lead to a hearing." Hearns testified that he then told Mitchell that he had a meeting with the Labor Board and he would report the incident. Hearns stated that Mitchell responded, "What's the matter, Bob, you're getting red?" Mitchell then said, "What are you gonna do swear at me?" (Tr. 518.) Mitchell then stepped back as if Hearns was going to strike him. In his testimony, Mitchell did not deny making these comments.

Thus, the undisputed evidence shows that Hearns was disciplined for having his sleeves rolled up in the scanning room and that the Respondent's conduct was inconsistent with the verbal instructions given to Hearns, and other drivers, by his supervisor, O'Connor (i.e., it was permissible for drivers to have their sleeves rolled up, so long as they put their uniform jackets on

³⁷ On February 21, another supervisor, Stan Parulis, gave Hearns a written warning for reporting to work nearly 1 hour after his start time. (G.C. Exh. 75.) The letter stated that Hearns' tardiness delayed the a.m. sort, "costing the Respondent approximately \$926.00 in overtime and contributed to excessive failures for the day." Hearns admitted that he was late, but filed a grievance disputing the assertion that he cost the Respondent money for overtime or that he contributed any failures on that day. According to Hearns, Mitchell agreed to strike the disputed language from the letter at a grievance hearing. This disciplinary action is not alleged to be a violation of the Act, but is mentioned because it is part of Hearns' overall work record that eventually resulted in further discipline.

³⁸ The letter also stated that because of this and similar incidents, "a local disciplinary hearing will be held to consider your overall work record." (GC Exh. 76.)

before leaving the terminal). The undisputed evidence also shows that Mitchell turned an unsympathetic ear to Hearn's legitimate concern that the Respondent was being inconsistent and that Mitchell sought to provoke Hearn so he could discipline him further. I find that the Respondent has failed to show that he would have engaged in the same conduct, even in the absence of Hearn's union activity.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act, by issuing Hearn a written warning letter on April 17, 1997, as alleged in paragraph 10(V) of the complaint.

22. The May 20, 1997 suspension

Paragraph 10(W) of the complaint alleges that on or about May 20, 1997, the Respondent unlawfully suspended Hearn for 5 days. The evidence shows that by letter, dated May 20, 1997, the Respondent informed Hearn that pursuant to the May 15, 1997, determination of the Ohio Joint State Grievance Committee, in connection with Hearn's February 6, 1996 termination based on his overall work record, his 5-day suspension would begin on May 20, 1997. (GC Exh. 79.) Because the unlawful January 29, 1996 termination was considered as part of the overall work record, I find that the 5-day suspension is also unlawful. I further find that the Respondent has failed to show that Hearn's overall work record as February 6, 1996, would have warranted a suspension even in the absence of his union activity.

Accordingly, I find that the Respondent unlawfully suspended Hearn on May 20, 1997, as alleged in paragraph 10(W) of the complaint.

23. The May 30 and June 3, 1997 warnings

On May 30, 1997, Hearn received a warning letter for tardiness, which also called for a disciplinary hearing to consider his overall work record. (GC Exh. 80.) The undisputed evidence shows that he reported to work 40 minutes after his start time. Although Hearn admitted that he was late, he disputed a part of the letter stating that his "tardiness delayed the AM sort operation by at least 10 minutes." (GC Exh. 81.) According to Hearn, the sort was still in progress when he arrived.

Four days later, on June 3, Hearn was late for work again. He received another warning letter, dated June 10, indicating that a disciplinary hearing would be held on his overall work record. Hearn again admitted that he was 20 minutes late, but asserted that he had a good excuse because there was a power failure in his neighborhood that prevented his alarm from going off. He therefore protested the warning letter.

The General Counsel does not argue that the warning letters for tardiness violated the Act. Rather, she argues that the warning letters unlawfully stated that there would be an overall work record hearing because the Respondent has used such hearings in the past to harass and intimidate union supporters, like Hearn.

The General Counsel's position fails for two reasons. First, the evidence does not show that the Respondent has used the "overall work record" hearing to harass union supporters. Rather, the evidence reflects that many drivers for many reasons have had "overall work record" hearings. (R. Exhs. 16 & 17.) Next, the undisputed evidence shows that Hearn was tardy

and that he had a well-documented absenteeism and tardiness problem for which he was disciplined in the past. Thus, the warning letters, as well as the notice of disciplinary hearing, were warranted. I therefore find that the Respondent would have disciplined Hearn, even in the absence of his union activities.

Accordingly, I shall recommend dismissal of the allegations in paragraphs 10(X) and (Y) of the complaint.

24. The June 6, 11, and 19, 1997 warnings

a. The June 6, 1997 warning letter

The evidence shows that the Respondent uses a gap report to monitor a driver's activities during his route. It is a computer printout of all the scanner functions performed by the driver reflecting when he left the facility, when he reached his first stop, the amount of time elapsed between stops, when he takes his break, when he returns to the facility, and how long he spends on the dock. (Tr. 1226.) All of these functions are keyed into the driver's hand-held computer scanner during the course of the day, and then periodically downloaded, and printed out at the station. In addition, the drivers have a hand-carried manifest that each customer signs at the time of delivery. This provides a cross-check against the computer printout.

On June 3, Hearn's computer generated gap report reflected a 47-minute gap between deliveries at mid-day. Mitchell surmised that the gap was the result of Hearn taking back-to-back breaks during the day, so he pulled the manifest to compare the information. Mitchell concluded that Hearn had taken back-to-back breaks, and that he failed to key the breaks into his scanner. On June 6, he issued Hearn a warning letter. (Tr. 1534; GC Exh. 85.)

Hearn filed a written protest stating that there was a long-standing practice initiated by the Company of encouraging drivers to forgo taking their morning break in order to expedite the morning deliveries and to double up their breaks later in the day.³⁹ (GC Exh. 85; Tr. 526-527.) The credible evidence shows, however, that while Kowal was the Beachwood DFSM it was determined that the drivers were entitled to two 15-minute breaks under the NMFA, one during the first 4 hours of their shift and the other during the last 4 hours. The evidence also shows that the "confusion" surrounding which policy would apply was shortly after driver Michael Shuba was disciplined for the same reasons. Thus, Hearn knew, or should have known, that he was not permitted to take two 15-minute breaks back-to-back.

Hearn also stated that he was never told to key in the functions f-38 and f-39 to indicate a break start and finish. However, the evidence discloses that on May 28, 1997, Supervisor O'Connor instructed Hearn to begin using break functions F-38 and F-39 on his scanner. (R. Exh. 81, p. 11.) Finally, Hearn testified that the gap was due to "stem time," which is the time it takes a driver to go from the terminal to the first delivery. (Tr. 528-529.) His explanation is implausible because both the

³⁹ Hearn testified that Mitchell disciplined another driver for taking back-to-back breaks prior to June 6. The evidence shows that Charging Party Michael Shuba was disciplined for taking back-to-back breaks sometime in March 1997.

manifest and gap report reflected that the gap occurred during the middle of the day. Thus, Hearn's testimony concerning the circumstances surrounding the June 3 gap was unconvincing. The evidence established that the Respondent would have issued the warning letter, even in the absence of Hearn's previous union activity.

Accordingly, I shall recommend that the allegations contained in paragraph 10(Z) of the complaint be dismissed.

b. The June 11, 1997 warning letter

On June 6, Mitchell also posted a written memo concerning breaks. It stated, in pertinent part:

The company recently had meetings regarding the company's break policy. There seems to be some confusion. This memo is being provided to clear any break misunderstandings that that you may have.

1. Each full-time driver gets two 15 minute breaks. One will be in [sic] in the first four hours of your shift and one in the last four hours of your shift.

2. The first break will not be taken during the AM Sort.

3. It has long been past practice at the Middleburg Hts. and

and Beachwood facilities that we work a straight eight with no lunch. Drivers will not place their breaks back to back to create a lunch.

4. When taking a break it will be logged into the scanner. When you begin your break use fpr (sic) function f-38 and when you end your break use function f-39. [R. Exh. 81 at p. 16.]

On June 9, the same memo (with one additional paragraph of no significance here) was posted again. (R. Exh. 81 at p. 17.)⁴⁰

The very next day, June 10, there was a 54-minute gap at mid-day on Hearn's manifest, which was unexplained on the gap report. Also, Hearn again failed to enter functions f-38 and f-39 on his scanner to record his break time. On, June 11, O'Connor asked Hearn why there was a gap and why he did not use the scanner functions. (R. Exh. 82 at 10.) The un rebutted evidence shows that Hearn responded, "He didn't care what Mitchell wanted because he (Mitchell) doesn't understand that he has a contract to follow and he just can't make these things up as he goes along."

In an effort to explain the gap, Hearn testified that his first stop on June 10 was at Cleveland Technical Products, where he sometimes encounters delays if he has to wait for the United Parcel Service driver to finish his delivery. (Tr. 1668.) The General Counsel intimates that this is what caused the gap on June 10 (G.C. Br. at p. 80), but I am not persuaded by this argument. To begin with, Hearn did not testify that on June 10 he was delayed in the morning at his first delivery. (Tr. 1667-1668.) Rather, he testified that he "sometimes" had a problem at that stop. Also, the evidence shows that the gap on June 10 occurred in the middle of the day, rather than in the morning.

⁴⁰ Hearn inadvertently conceded that Mitchell's description of the policy as stated in the June 6 memo was consistent with the NMFA. (Tr. 680-681.)

Thus, the evidence shows that Hearn was aware that he was not entitled to two 15-minute breaks back-to-back and that he was required to key enter his breaks into his scanner, but that he refused to comply and fabricated an excuse for not doing so. I find that the Respondent would have disciplined Hearn even in the absence of his perceived union activity.

Accordingly, I shall recommend the dismissal of paragraph 10(BB) of the complaint.

c. The June 19, 1997 warning letter

On June 17, a 40-minute gap during the morning appeared on Hearn's manifest. He also again failed to use the proper scanner functions for his break. Hearn received another warning letter, dated June 19. Regarding this warning, Hearn testified that the gap occurred because he had to pull off the road after leaving the station to sort his freight. He also asserted that he and the other drivers regularly pull off the road after leaving the terminal to sort freight.

There is no evidence to support Hearn's claim that he regularly pulled off the road to sort freight after leaving the terminal. If that were true, one would expect similar gaps to appear on the other gap reports and manifests, which they do not. Thus, the evidence viewed as a whole discloses that the Respondent would have issued the three warnings to Hearn, even in the absence of his union activity.

Accordingly, I shall recommend that the allegations contained in paragraph 10(CC) of the complaint be dismissed.

25. The June 12, 1997 warning

On June 6, Hearn bumped an "I" beam on the dock, while operating a tow motor. It took place close to the dispatcher's window. Supervisor Parulis came onto the dock to assess the situation. There was no noticeable damage. Parulis went back to his office and Hearn went back to work. The next day, June 7, the Saturday supervisor, Downing, told Hearn that Mitchell wanted him to fill out an accident report, which he did. On June 12, Mitchell gave Hearn a warning letter for having a "preventable" accident, and also initiated an overall work record disciplinary hearing.

The Respondent argues that it has a longstanding policy of disciplining drivers who have preventable accidents. It points out that only a few weeks earlier Hearn was involved in another tow motor accident, which resulted in \$1900 to the tow motor and the dock. At that time, he was warned that future violations would result in additional disciplinary action including suspension. (R. Exh. 80.)⁴¹ The Respondent therefore asserts that Hearn was disciplined in accordance with the policy and that several other drivers who have been involved in preventable accidents have been likewise disciplined.

The evidence shows that the policy of disciplining drivers pertains to motor vehicle accidents and that the other drivers who were disciplined were involved in accidents with their trucks. The Respondent has not pointed to any evidence showing that a driver was disciplined under its policy for a tow motor accident, other than Hearn. In addition, the evidence does

⁴¹ There is no evidence that Hearn grieved the earlier May 29 warning and the warning letter was not included in the complaint as a part of the pattern of harassment.

not show that there was any justification for giving Hearn a warning on June 12. Parulis, who was present when Hearn brushed the pole, thought nothing of it. Understandably so, because even Mitchell admitted there was no damage to the tow motor. (Tr. 1530.) The fact that Hearn caused significant damage to a tow motor in a prior accident does not change the fact that here, unlike there, there was no damage. Thus, I find that the reason given for disciplining Hearn was pretextual.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by giving Hearn a warning letter on June 12, 1997, as alleged paragraph 10(AA) of the complaint.

26. The June 20, 1997 warning

On Friday, June 20, Hearn took a sick day off. He was scheduled to begin a week's vacation on Monday, June 23. When he returned to work on Monday, June 30, he was given a warning letter, dated June 20. Hearn testified that he took the sick day because he had worked "a lot of hours, and stuff like that. And I just didn't feel well. And like I said, I wa—I had to do some traveling the next day." (Tr. 538.) The Respondent asserts it gave Hearn a warning because it cannot cover for a missing driver's route on short notice and that it disciplined another driver for the same offense.

The Respondent's defense is unconvincing. The evidence shows that the Respondent has a call list of casual drivers, which it uses to fill in for sick and vacation days. It has not shown that it was unable to find a replacement for Hearn. In addition, the other driver who received a warning letter for the same offense was not disciplined until after Hearn received the June 20 warning letter. There is no evidence that any driver before Hearn was disciplined specifically for extending their vacation by taking a sick day. The Respondent therefore has failed to show that Hearn would have been disciplined, even in the absence of his union activity.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by giving Hearn a warning letter on June 20, 1997 as alleged in paragraph 10(DD) of the complaint.

27. The July 1, 1997 termination letter and subsequent phone call

a. The delayed discharge letter

On June 30, Supervisor Parulis told Hearn that he should be back at the terminal by 1:30 p.m. for an investigative hearing. Parulis did not provide any details. Instead, he directed Hearn to speak to Mitchell. Hearn immediately went to see Mitchell, who would not tell him the purpose of the hearing. Mitchell's only response was that, "We haven't decided yet." (Tr. 539.) After completing his route, Hearn called Union Business Agent Dan Kovak, who advised that Bill Kowal, DFSM, Middleburg Heights, told him it was going to be a discharge hearing.

The meeting was attended by Mitchell and Kowal for the Respondent,⁴² Hearn, Kovak, and Union Steward Phil Castro on behalf of Hearn. The disciplinary hearing was based on Hearn's overall work record over the preceding 9 months. At

the end of the meeting, Mitchell and Kowal advised Hearn that he would be discharged, that he would continue working pending the filing of a grievance, and that he would receive a discharge letter in the mail.

Mitchell testified that he sent a certified mail letter, dated July 1, 1997, to Hearn, but that it was returned because of insufficient postage, so he mailed it again. The evidence shows that the re-mailed letter was posted marked July 9, and received by Hearn on July 10.

At 12:02 a.m. or midnight on July 11, Supervisor O'Connor acting on Mitchell's instructions phoned Hearn at home to tell him not to come to work because he had failed to file a timely grievance and therefore he no longer was employed by the Respondent. At the hearing, Mitchell testified that Hearn had 10 days from the date of discharge (June 30) to file a grievance, which he failed to do. In contrast, Hearn testified that he had 10 days from the date he received written notification of discharge to file a grievance.

On July 11, Hearn immediately filed a grievance protesting his discharge. The following week a procedural hearing was held in Columbus, Ohio, to determine if the grievance was timely filed. At that meeting, it was determined that Hearn should return to work because Mitchell had failed to reference in his letter the "Ohio Rider" which explains that there is a 10-day time limit for filing a grievance. Hearn's grievance then moved forward to the Ohio Joint State Committee which eventually reduced the discharge to a 3-week suspension without pay on May 21, 1998.

The General Counsel argues that the failure to notify Hearn promptly in writing of his discharge was intended to harass him because of his union activities in violation of Section 8(a)(1) of the Act. I agree that the Respondent's conduct was unlawful, but I find that it was unlawfully motivated in violation of Section 8(a)(3) of the Act. Specifically, I find that the manner in which the discharge hearing was spontaneously convened, the reluctance of Mitchell to share any details about the meeting, and the unexplained presence of Kowal, the Middleburg DFSM and Hearn's nemesis, calls into question the true motivation for the hearing. In addition, Mitchell's explanation for failing to properly mail the discharge letter was unconvincing. It is difficult to believe that a national air freight carrier is not capable of properly mailing a certified letter by U.S. mail. Mitchell's testimony on this point was not persuasive. Thus, I find that the Respondent intentionally treated Hearn differently than other employees in an attempt to summarily discharge him for perceived union activity.

Accordingly, I find that by the conduct alleged in paragraph 6(J) of the complaint the Respondent violated Section 8(a)(3) of the Act.

b. The midnight phone call

The General Counsel also asserts that the midnight phone was intended to harass Hearn. I agree. I am unpersuaded by Mitchell's testimony that the 12:05 a.m. phone call from O'Connor to Hearn was a magnanimous gesture to save Hearn the inconvenience of driving to work in the early morning of July 11. Rather, I find that the phone call was an attempt by

⁴² The Respondent did not adequately explain why Kowal was present.

Mitchell to “tweak” Hearn’s one more time before telling him that he had been discharged.

Accordingly, I find that the Respondent sought to harass Hearn’s because of his union activity by telephoning him at home shortly after midnight in violation of Section 8(a)(1) of the Act as alleged in paragraph 6(K) of the complaint.

28. The June 30, 1997 disciplinary hearing and discharge

The complaint alleges that the Respondent violated Section 8(a)(3) of the Act (1) by holding a disciplinary hearing on June 30, 1997 and (2) by discharging Hearn’s on that date. The General Counsel argues that a discriminatory motive can be gleaned from the manner in which the hearing was conducted, the shifting reasons for calling the meeting, and the ultimate decision to discharge Hearn’s. There is no evidence, however, that a particular type of notice of hearing was required or that a certain procedure had to be followed in order to initiate a discharge hearing. Also, there is no evidence showing that the disciplinary hearing on June 30 was conducted differently from any other disciplinary hearing.

Regarding the decision to discharge, the evidence reveals that it was based on discipline rendered during the period of February – June 1997, some of which I have found to be unlawful. Notwithstanding the unlawful disciplinary actions, the un-rebutted evidence shows that during the same time period Hearn’s received warnings which are not subject to the allegations of the complaint. For example, the evidence reflects that Hearn’s received warning letters for being late for work on February 21, and that other employees also were disciplined for being tardy. The evidence also shows that Hearn’s received a warning letter for being involved in an accident that caused extensive damage to a tow motor on May 28.

In addition, Hearn’s overall work record during the period February–June 1997 contains discipline which I have found does not violate the Act. For instance, he received warning letters on May 30 and June 3 for being tardy. He also received warning letters on June 6, 11, and 19, for failing to use the proper key code function while taking breaks and because he had substantial gaps in his manifest record. Thus, under all the circumstances proved, I find that the Respondent would have held a disciplinary hearing and discharged Hearn’s, even in the absence of his union activity.

Accordingly, I shall recommend that the allegations in paragraphs 10(EE) and (FF) of the complaint be dismissed.

29. The September – October 1997 warnings

a. The September 17, 1997 warning letter

Hearn’s continued working while waiting for a hearing before the Ohio Joint State Committee on his June 30, 1997 discharge. On September 17, a plane arrived late. While the drivers were waiting for the shuttle truck to come from the airport, Hearn’s was talking to a co-worker. Supervisor Doug Downing testified that Hearn’s truck was in the number one slot on the conveyor belt. When the shuttle truck arrived from the airport, Downing asked Hearn’s to go to his truck to ensure that there would be no problems at the head of the line. (Tr. 1272.) As Downing walked up toward the head of the conveyor belt to make sure that the containers were being staged in the proper position,

Hearn’s continued to talk to the other driver. When Downing returned 3-5 minutes later, he again told Hearn’s to go to the back of his truck to which Hearn’s responded, “All right Doug...the belt hasn’t even started. I’m going right now.” (Tr. 548.) Later that day, Hearn’s received a warning letter signed by Supervisor John O’Connor.

Hearn’s testified that after he received the warning letter, dated September 17, he questioned Downing about it because the letter was signed by Supervisor O’Connor. According to Hearn’s, Downing told him that he did not know anything about the letter. In contrast, Downing testified that “he” gave the warning letter to Hearn’s because Hearn’s failed to follow his instructions. For demeanor reasons, I credit Downing’s testimony that he gave Hearn’s the warning letter for failing to follow a simple instruction at a critical time in the a.m. sort.⁴³ Thus, the credible evidence supports a reasonable inference that the Respondent would have disciplined Hearn’s, even in the absence of union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(GG) of the complaint be dismissed.

b. The September 23, 1997 warning letter

On September 23, Hearn’s was given a warning letter by Supervisor Parulis for failing to report four attempted deliveries to the dispatcher. According to Hearn’s un-rebutted testimony, when he questioned Parulis about the circumstances underlying the letter, Parulis said he would look into the matter and get back to him, but he never did. Parulis did not testify at the hearing. I draw an adverse inference from his failure to testify. *Jim Walter Resources*, 324 NLRB 1231, 1233 (1997). Also, the Respondent did not put into evidence any information explaining the details surrounding the alleged failed deliveries. Thus, the Respondent has failed to show that it would have taken the same action in the absence of Hearn’s union activity.

Accordingly, I therefore find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 10 (HH) of the complaint.

c. The October 29, 1997 warning letter

By letter, dated October 29, 1997, Hearn’s received a warning for failing to scan properly 31 packages for delivery. Hearn’s did not dispute that 31 packages were not properly scanned. Instead, he testified that he had problems with his scanner that day causing him to switch to another scanner. Hearn’s stated that he did not rescan his entire load because he did not realize that it was necessary to do so in order to have a complete manifest. In retrospect, Hearn’s speculated that this is what caused the problem based on what was discussed at his grievance hearing.

Hearn’s testimony was incredulous. It is almost incomprehensible that a driver with the second highest seniority with the Respondent did not know that it was necessary to rescan his load when he changed scanners. It is almost incomprehensible that a former union steward, who attended numerous disciplinary hearings for drivers who failed to properly scan their loads, did not know that it was necessary to rescan his load. In

⁴³ There is no evidence that Hearn’s grieved the warning letter.

addition, the written grievance filed by Hearn for this warning states that he "scanned all packages the exact same way as I do any other day." (G.C. Exh. 99.) It does not mention that he had a problem with his scanner. His testimony therefore is inconsistent with his written grievance. Thus, I find that Hearn's explanations are contradictory and incredulous.

In the final analysis, the undisputed evidence shows that Hearn did not properly scan 31 packages and that the Respondent has disciplined other employees for the same infraction. (R. Exh. 53.) Thus, I find that the Respondent would have disciplined Hearn even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(II) of the complaint be dismissed.

d. The October 30, 1997 warning letters

On or about October 30, Hearn received two separate warning letters. One for failing on October 27 to deliver a Xerox shipment on time and another for failing on October 28 to deliver 2 AMX, 1 AEX, and 1 Kodak shipments on time. Hearn testified that he was assigned a new route that week. He conceded that the first day on the route, October 27, he may have failed to make the delivery on time, but attributed the error to the fact that the route boundaries had changed. (Tr. 563.) With respect to October 28, the second day, Hearn stated that the size of the route was doubled which may have caused him to miss a few deliveries.

On or about October 31, Hearn received another warning letter for failing to meet a delivery time commitment on October 22. Hearn did not deny missing the deadline nor did he attribute the error to a route change. Rather, he testified that he "was a little confused." (Tr. 568.)

Although Hearn did not deny that he missed the deliveries, the General Counsel argues that the warnings were given in retaliation for union activity. The evidence shows, however, that other employees have been similarly disciplined for the same and similar offenses. Thus, I find that the Respondent would have disciplined Hearn, even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraphs 10(JJ) and (KK) of the complaint be dismissed.

30. The December 1, 1997 warning

The complaint alleges that on or about December 1, 1997,⁴⁴ Hearn received a warning letter for having exceeded the DOT 60-hour per week driver limit.⁴⁵ According to Hearn's undisputed testimony, he was working on Saturday on a route in the snowbelt. Due to a severe storm the roads were in poor condition which delayed his return to the terminal. Hearn pointed

out that DOT regulations provide an exception for such circumstances. He nevertheless received a warning letter.

The Respondent's defense is that it never happened on December 1, as alleged in the complaint, but instead on December 4, and therefore the allegations should be dismissed. Although the General Counsel did not amend the complaint to reflect the correct date, I find that the Respondent had ample notice of the violation in question and that the matter was fully and fairly litigated. Thus, I find, in the absence of a credible explanation for the warning, that the Respondent has failed to show that Hearn would have received a warning letter, even in the absence of his union activity.

Accordingly, I find the Respondent violated Section 8(a)(3) of the Act by giving Hearn a warning letter on or about December 11, 1997, or as alleged in paragraph 10(LL) of the complaint.

31. The December 26, 1997 telephone call

On December 26, 1997, Hearn did not report to work. When Mitchell phoned him at home to find out why he absent, Hearn told him he was scheduled off for vacation. Hearn told Mitchell that his vacation had been approved by Supervisor Parulis, and that Hearn had a copy of the approved vacation form. According to Mitchell, Parulis had failed to post the vacation request and/or enter a copy of it in the vacation notebook. Therefore, he had no prior knowledge that Hearn was scheduled off for vacation.

The General Counsel argues that Mitchell called Hearn at home simply to harass him because of his union activity. I credit Mitchell's explanation. If Mitchell wanted to harass Hearn, he could have issued a warning letter for an unexcused absence. Instead, he chose to inquire as to why Hearn did not report. There is no evidence that the phone call was made late at night, or that Mitchell pursued the matter after Hearn's explained why he did not report for work. The un rebutted evidence also shows that as a result of this incident Mitchell initiated the use of a multi-copy vacation request form to ensure that in the future all necessary supervisory personnel received the appropriate information.

Accordingly, I shall recommend that the allegations of paragraph 6(M) of the complaint be dismissed.

32. The January 19, 1998 disciplinary hearing and discharge

On January 19, 1998, the Respondent held a company level disciplinary hearing to determine whether Hearn's overall work record since July 1, 1997, warranted disciplinary action. A review of the Hearn's work record revealed that he had received the following warning letters:

9/2/97	workrule violation for being 38 minutes tardy on August 29, 1997
9/17/97	failing to work as directed (return to his truck as directed by supervisor)
9/22/97	workrule violation for being 50 minutes tardy on September 18, 1997
9/23/97	failed to call-in four attempted deliveries to the dispatcher
10/29/97	failure to properly scan-out for delivery 31 pieces of freight

⁴⁴ The actual date of occurrence was December 11, 1997, as pointed out by the Respondent in its answer. The General Counsel, however, did not amend the complaint.

⁴⁵ Neither the warning letter nor the grievance protesting the same were introduced into evidence by the General Counsel at the hearing. However, copies of the same were introduced in evidence at the Ohio Joint State Committee meeting concerning Hearn's discharge. (See R. Exh. 65 (G), p. 37.)

- 10/30/97 failed to make a Xerox delivery on time
- 10/30/97 failed to make three American Express deliveries on time
- 12/11/97 work over 60 hours in one week without authorization
- 12/24/97 workrule violation for being 42 minutes tardy on December 24, 1997

The Respondent decided to discharge Hearn based on this performance record and advised him of the same by letter, dated January 20, 1998. (GC Exh. 106.)

On May 21, 1998, the Ohio State Joint Grievance Committee upheld the discharge.⁴⁶

The General Counsel argues that the January 19 hearing, the warning letter of January 20, and the ultimate discharge of Hearn violate the Act. I disagree. Excluding the September 23, 1997, failure to call-in four attempted deliveries, and the December 11, 1997, warning letter for working over 60 hours in one week, the evidence shows, and I find, the Respondent would have discharged Hearn, even in the absence of his union activity.

Accordingly, I shall recommend that the allegations of paragraph 10(MM) of the complaint be dismissed.

F. Alleged violation concerning John Root

1. Facts

John Root became a part-time driver for the Respondent in June 1993. A month later, he became a full-time driver working the second shift at the Beachwood facility. During Root's employment at Beachwood, the Respondent had an informal practice of allowing drivers to switch shifts with the approval of their supervisors and the concurrence of another driver. (Tr. 1367-1368.)

On or about January 23, 1996, Root asked his supervisor, John O'Connor, in the presence of Supervisor Mitchell, if he could switch a day shift for a night shift in the same service area with a driver named Ellen Maynard. Root explained that he was planning a trip to Florida and that the switch would accommodate his travel plans. Neither O'Connor or Mitchell had any objection to the switch, so long as it was all right with Maynard.

On February 6, 1996, Root became an alternate union steward at the Beachwood facility. The Union asked Root to circulate a petition for the drivers to sign indicating that they had heard Supervisor O'Connor use profane language when talking to drivers or giving instructions. The petition was to be used in a grievance hearing in which the Respondent was seeking to discharge Union Steward Bob Hearn for using profane language.

On February 9, which was the Friday before Root was to begin his trip to Florida, O'Connor approached him on the dock telling him that his request to switch shifts was no longer possible, and if he had any questions he was to see DFMS Kowal. Root went to Kowal's office the next day. After Kowal asked

Middleburg Heights DFMS Tom Hearn to leave his office, Root asked why his request to change shifts had been canceled, after being approved by O'Connor and Mitchell. Root testified that Kowal told him that O'Connor and Mitchell did not have the authority to approve the switch, and that the request was being denied because Root had "f--ked him." (Tr. 719.) Kowal took out the petition that Root had circulated and told him that anything against his supervisors reflected poorly on him and that if Root became involved in any driver dispute he would be fired. Root further testified that Kowal told him to go out, do his job, mind his business, and there would be no problems. But if Root sided with the Union against the Company, he would lose. (Tr. 720.) When Root attempted to point out that his work record was good, Kowal responded that he would make mistakes, and if he did not, that Kowal would make them up.

Kowal admitted that he told Root that he had "f--ked him" and stated that he was upset because on several prior occasions Root had come to Kowal's office complaining that Bob Hearn had threatened his life and was intimidating him. (Tr. 1370.) Kowal stated that is why he was surprised and upset to see Root's name on a "petition saying Mr. Hearn was an outstanding employee, and I think it had something to do with one of the supervisors as well." (Tr. 1370.) But Kowal denied that he canceled Root's shift switch because of the petition. Rather, he testified that he decided to no longer allow drivers to informally switch shifts because he had received complaints from senior drivers who felt that the informal practice was eroding their seniority. (Tr. 1368.)

While I credit Kowal's testimony that Root had previously complained to him about Hearn, (Tr. 1642-1646), the rest of his testimony that the petition had nothing to do with canceling the shift switch is incredulous. On direct examination Kowal admitted that he told Root that he had "f--ked him" (Tr. 1369), but he could not (or would not) explain specifically what Root did to "f--k him." (Tr. 1417-1420.) Kowal also did not explain why he waited until Root had circulated the petition before purportedly changing the longstanding informal shift switch policy. Finally, Kowal did not deny that he told Root that if he got involved in any more driver disputes, he would be fired, and if he sided with the Union, he would lose.

Two weeks later, while on his regular route, Root was radioed by Supervisor Culkar, who asked him to phone the office. When Root called-in, Kowal answered the phone demanding to know what federal law he had violated. (Tr. 720-721.) Root was puzzled by Kowal's remarks, but assumed that Kowal was talking about the threatening remarks that he made 2 weeks before. When Root attempted to explain why he felt threatened, Kowal cut him off by telling him to file a grievance and also that he was giving Kowal a verbal warning for directing the part-time work force. (Tr. 721.) Root had no idea what Kowal was referring to.

A few days later, Root received a warning letter, dated February 26, 1996, signed by Supervisor Culkar, which stated "on February 22, 1996, it was brought to the attention of the District Field Services Manager that you were directing the part-time workforce." (GC Exh. 112.) When Root asked his supervisor, John O'Connor, for an explanation, he was told that it was a matter between he and Bill Kowal. (Tr. 722.) Root testified that

⁴⁶ In a separate hearing held on the same date, the Ohio State Joint Grievance Committee reduced the discharge of June 30, 1997 to a 3-week suspension.

he did not seek an explanation from Kowal because he was uncomfortable approaching him to discuss the matter.

On March 1, shortly after he received the warning letter, Root attended a local disciplinary hearing as alternate union steward concerning the suspension of Bob Hearn for using profane language. According to Root, Kowal began the hearing by saying that he had been told by some of the employees who signed the petition that they were either forced to sign or told to sign it. When Kowal asked if anyone wanted to respond to his comment, Root explained that he passed around the petition and no one was forced or told to sign it. A short time later, Root received a warning letter, dated March 1, stating that he was insubordinate to Supervisor Culkar over the two-way radio on February 29, 1996. Root testified that he had no idea why he received the warning.

At the end of February 1996, Root suffered a work related back injury and was off from work until mid-April 1996. Before returning to work, Root sought to make sure he received a route that he was capable of performing. A few days before his scheduled return, he called Supervisor O'Connor, who told him he would be assigned to his regular route. When he returned, however, Root was assigned to the dock, which required pulling, pushing, and heavier lifting. It was not until some time later that Root was reassigned to his old route.

2. Analysis and findings

a. The unlawful denial of the request to switch shifts

The undisputed evidence shows that almost immediately after Root became alternate Union steward and circulated the petition stating that O'Connor used profanity while talking to drivers or giving instructions, Kowal canceled the approved shift switch in contravention of a longtime informal practice of allowing drivers to switch shifts for a day with the approval of their supervisors. The undisputed evidence also shows that when Kowal said that he was denying the request because Root "f--ked him" he took out the petition and showed it to Root. Thus, the timing of the conduct and the reference to the petition establishes that the shift switch was denied for discriminatory reasons.

Kowal nevertheless testified that he decided to end the informal practice by denying Root's request because he had received an unspecified number of complaints from senior drivers about junior drivers being allowed to switch from day to night shifts, and vice versa, thereby circumventing the seniority system. He also pointed out that he was not contractually obligated to allow a person to switch, so he decided not to do it. His explanation was unpersuasive. Even if Kowal had received some complaints, he never explained why he waited until after Root circulated the petition to do away with the practice. He also did not explain why he referred to the petition when he told Root "you f--ked me." I therefore find that the Respondent's reasons for canceling the shift switch are pretextual.

Accordingly, I find that by denying John Root's request to switch shifts on or about February 12, 1996, the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 9(A) of the complaint.

b. The unlawful threat and interrogation of February 12, 1996

When Root went to Kowal's office on February 12 to find out why his request for a shift switch had been denied, Kowal essentially asked him why he had circulated the petition. Root credibly testified that in the course of his conversation, Kowal told him not to get involved in driver disputes and if he sided with the Union against the Company, he would lose. Root testified that Kowal also stated that Root would make mistakes for which he would be disciplined, and if he did not make mistakes, then Kowal would make some up. Root's testimony is un rebutted. Thus, the evidence shows that Kowal unlawfully questioned Root about his union activity and threatened him with discipline if he continued that activity. Accordingly, I find that Kowal unlawfully interrogated and threatened Root in violation of Section 8(a)(1) of the Act as alleged in paragraphs 6(F) and (G) of the complaint.

c. The unlawful threat and verbal warning of February 22, 1996

The un rebutted evidence shows that on February 22 Kowal again questioned Root over the phone about his union activity by asking him what Federal law he had broken and what contract provision he had violated. In the same phone conversation, Kowal told Root to file a grievance, and that he also was giving him a verbal warning for directing the part-time work force. Kowal did not offer an explanation for the warning then or at the hearing. He also did not dispute Root's version of what occurred. I find that the Respondent has failed to show that Root would have received a verbal warning, even in the absence of his union activity.

Accordingly, I find that Kowal unlawfully interrogated Root over the phone on February 22, 1996 in violation of Section 8(a)(1) of the Act. I further find that the Respondent violated Section 8(a)(3) of the Act by giving Root a verbal warning as alleged in paragraph 9(B) of the complaint.

d. The unlawful February 26 and March 1, 1996 written warnings

On February 26, Supervisor Culkar gave Root a written warning letter without explanation for directing the part-time work force. When Root asked O'Connor about the letter, he was directed to Kowal. A few days later, Root attended a suspension hearing for Union Steward Bob Hearn during which the Kowal brought up the petition. Shortly, thereafter, Root received another warning for insubordination. Root credibly testified that he was unaware of anything that he had done which would have warranted either warning. Kowal and Culkar both testified at the hearing, but neither were asked by their counsel to explain the circumstances surrounding the February 26 or the March 1 written warnings. I draw an adverse inference from their failure to testify about these warnings. Specifically, I find that had Kowal and Culkar or either one of them testified about the February 26 and/or March 1 warnings their testimony would not have supported the Respondent's position that Root received the discipline for misconduct.

Thus, the Respondent has failed to show that Root would have received the two written warnings, even in the absence of his Union activity. Accordingly, I find that the Respondent

violated Section 8(a)(3) and (1) of the Act as alleged in paragraphs 9(C) and (D) of the complaint.

e. The unlawful reassignment to the dock

The Respondent's explanation for assigning Root to work on the dock is unconvincing and pretextual. On brief, it asserts that Root was temporarily assigned to the dock because a severe storm passed through the Cleveland area on the day he returned, April 12, which took the roof off the Beachwood terminal office and significantly disrupted operations. It further asserts that his last minute reassignment resulted from these circumstances and the fact that all routes were covered. Although Mitchell testified that the office was damaged by a storm on April 12, he did not connect this event to Root's sudden reassignment or even mention Root in the context of the storm. (Tr. 1486-1488.) For that matter, Mitchell did not give any reason for Root's sudden reassignment to the dock. Likewise O'Connor did not explain or attempt to explain why Root was not assigned to his regular route as promised.

In the absence of any testimony from either of these witnesses, who were in a position to comment on the circumstances surrounding the reassignment, I draw an adverse inference that had they testified about this issue their testimony would not have been favorable to the Respondent. Thus, I find that the Respondent's explanation or lack thereof for Root's reassignment is pretextual.

Accordingly, I find that by reassigning Root to the dock on or about April 12, 1996, the Respondent violated Section 8(a)(3) of the Act by as alleged in paragraph 9(E) of the complaint.

G. Alleged Violations Involving Jon Krokey

Driver Jon Krokey was assigned to the Beachwood terminal. He served as alternate union steward from 1992 to June 1996. In the spring 1996, he also served as acting union steward during Hearn's suspension.

1. Supervisor O'Connor's comment

One day in October 1995, Krokey walked by the union bulletin board, where Supervisor John O'Connor stood reading a notice about a union meeting. The notice contained a phrase telling the drivers, "It's time to get involved." According to Krokey, O'Connor kept repeating, "Its time to get involved," changing the inflection in his voice. Krokey walked past the bulletin board and into the restroom where he was joined by O'Connor. While Krokey was using the urinal, O'Connor stood at the urinal next to him and said, "It is truly an honor and a pleasure to piss in the same restroom as Jon Krokey, alternate union steward." Krokey did not respond. As he was washing his hands, O'Connor asked him, "What's wrong, cat got your tongue?" to which Krokey responded that he did not speak to idiots. (Tr. 1020-1021.)

The General Counsel argues that O'Connor's comments at the bulletin board and in the restroom were coercive taunts directed at Krokey because of his union activity in violation of Section 8(a)(1) of the Act. O'Connor admitted making the remark in the restroom, but denied chanting, "its time to get involved," in front of the union bulletin board. For demeanor reasons, I do not credit his denial. Krokey testified that he felt

that O'Connor was ridiculing the Union and that he felt restrained in the exercise of his duties as alternate union steward. (Tr. 1061.) While the latter statement is self-serving, the evidence discloses that both remarks were derogatory toward the Union and Krokey, as a union official, and both were made in areas open to the other drivers. The evidence also shows that O'Connor's remarks were made shortly after Hearn's rift with Kowal during which Kowal told Hearn that he would start writing up the drivers. In view of the nature of the remarks, the location in which they were made, the manner which they were made and when they were made, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(D) of the complaint.

2. The March 14, 1996, warning letter

Certain deliveries require the driver to obtain a signature before leaving the package. If a signature cannot be obtained, the driver must enter an "SIGL" into his scanner. On March 12, 1996, Krokey erroneously enter an "SIG1" into his scanner, prompting Mitchell to point out his error. The next day, March 13, Krokey made the same mistake and therefore was given a warning letter, dated March 14, 1996.

The following day, March 15, driver Rita Ineman missed some freight going down the belt. She was reprimanded by DFSM Mitchell for doing so, at which point they began to argue. Krokey overheard the discussion and intervened by telling Ineman that she had the night to call a halt to the conversation if she thought that it would lead to discipline. Ineman nevertheless kept arguing with Mitchell, whereupon Krokey told her to stop and pulled her aside. Krokey testified that Mitchell told him that he had no business intervening and that he was not allowed to conduct union business on the dock or on company property. With that, Krokey started to walk away with Mitchell following close behind.

The General Counsel argues that Krokey received the warning letter because he sought to perform his role as alternate union steward by rendering assistance to Ineman. The argument fails for two reasons. First, Krokey's warning letter was dated March 14, 1996. While the General Counsel did not specify the date of Ineman's argument with Mitchell, the evidence shows that she received a warning letter for insubordinate behavior toward Mitchell on March 15, 1996 (R. Exh. 56), which is the only warning letter of record for Ineman in that time frame. Thus, the evidence supports a reasonable inference that the incident in question concerning Ineman occurred after Krokey received a warning letter and therefore it could not have been a factor in the decision to issue Krokey a warning letter.

Second, the evidence shows that other employees have similarly been disciplined for failing to enter the proper codes in their scanners, which Krokey did not deny doing. (R. Exh. 53.) I therefore find that the Respondent would have disciplined Krokey, even in the absence of his union activity.

Accordingly, I shall recommend the dismissal of the allegations in paragraph 8(B) of the complaint.

3. Uncontested warning letters and Krokey's resignation as alternate union steward

Between May and June 1996,⁴⁷ Krokey received two warning letters neither of which are the subject of any allegation of the complaint. On or about May 10, 1996, Krokey instructed some drivers not to use their Orion computers in dispatch. He received a warning letter, dated May 15, 1996, for directing the work force. (R. Exh. 71.) On June 13, 1996, he received another warning letter for addressing DFSM Mitchell with vulgar language. (R. Exh. 71.) On that date, Mitchell directed Krokey to move his vehicle within 3 feet of the belt to which Krokey responded with vulgarity. Krokey did not grieve either of these warning letters.

Sometime in June 1996, Krokey resigned as alternate union steward. In the months that followed, Krokey was disciplined several times up to and including a 1-day suspension, some of the warnings he grieved and some he did not. However, none of these warnings is the subject of any allegation in the complaint.

For example, on June 6, Krokey received a warning letter for being involved in a preventable accident, which he did not contest. On November 14, he received another warning letter for being involved in a preventable accident, which he grieved noting that "[t]he company sends disciplinary letters to most people involved in accidents solely to cover themselves with their superiors." (R. Exh. 71.) On December 17, he received a warning letter for failing to scan out 19 packages for delivery, which he did not grieve. (R. Exhs. 53 and 71.)

On January 6, 1997, Krokey received a warning letter for being involved in another accident. The evidence does not show that a grievance was filed. On January 10, he received a 1-day suspension based on his work record up to November 14, 1996, and a 5-day suspension for having a third preventable accident in 9 months and based on his work record on and after November 14, 1996. The local grievance committee reduced the 1-day suspension to a "record of hearing" and the 5-day suspension to a 1-day suspension. (R. Exh. 71.) In his grievance protesting the 1-day suspension, Krokey stated, "[D]ue to my former position as steward Local 407 and my involvement in the NLRB lawsuit now pending against Airborne Freight the Company has tried and is still trying to show me as a trouble or troublesome employee." Notwithstanding that assertion, neither the 1-day suspension or any of the other disciplinary actions between June 6, 1996, and January 10, 1997, are the subject of any allegation in the complaint.

4. Subsequent disciplinary actions

a. The alleged 8(a)(3) violations

On or about April 1, 1997, which was 9 months after Krokey resigned as alternate union steward, he received a warning for failure to remove all written communications from his mailbox. (G.C. 151.) According to Supervisor O'Connor, all the drivers have an assigned mailbox and they are frequently reminded that it is necessary to check their mailboxes for various written

communications before going out on the road. Krokey testified that on April 1 he checked his mailbox at the beginning of his shift and then made a run to the airport to unload an airplane. The evidence reflects that between the time Krokey left for the airport and the end of the a.m. sort, one of the supervisors, possibly O'Connor, placed another written communication in Krokey's mailbox which he did not pick up before leaving on his morning route. Krokey stated that he did not check the mailbox a second time because he already had checked it once that morning. O'Connor testified that every driver is required to download their scanners in the driver's room and check their mailbox, which is located directly below the scanner cradles, before leaving the terminal. Thus, the evidence shows that Krokey could have, and should have, checked his mailbox again before departing the terminal.

On July 2, 1997, Krokey inadvertently locked his keys in his truck while making a delivery. He immediately phoned Downing who said that he would send someone with a spare set of keys. An hour later, Krokey phoned him again. Downing stated that he would send a tow truck because he did not have a spare set of keys. He also told Krokey to do whatever needed to be done to open the truck. When the tow truck eventually arrived, Krokey told the driver to punch out the lock on his truck. Still unable to open the truck, it was towed back to the terminal.

On July 9, Krokey received a warning letter for carelessness (i.e., locking his keys in his truck) resulting in a towing expense, lock replacement, and multiple service failures. (GC Exh. 153.) Krokey filed a letter of protest (a grievance) claiming that the Respondent's negligence caused the problem. He asserted that the Respondent should have had a spare set of keys and that it should have sent a locksmith rather than a tow truck to resolve the problem. According to O'Connor, the Respondent normally maintained a spare set of keys for each truck, but around this time there was a problem with drivers taking the extra set and hiding them. The evidence shows, and I find, that Krokey was careless in locking his keys in the truck and that his carelessness is not mitigated by the Respondent's failure to have a spare set of keys.

Krokey testified that he had a doctor's appointment on August 1. One week before he advised O'Connor that he would have to leave early on that day. On August 1, before leaving the terminal to deliver his route, Krokey reminded O'Connor about his doctor's appointment and asked if arrangements had been made to deliver the freight which he would not be able to deliver. O'Connor told him to take all the freight out and bring back what was left over. Krokey brought back two pieces of freight that he attempted to deliver without success. The next day, DFSM Mitchell asked him why he brought back the freight. Krokey testified that when he explained the situation, Mitchell told him that he was required to deliver all of his freight or he would be written up. A few days later, on August 5, O'Connor gave him a warning letter for bringing back "unattempted" freight on August 1.⁴⁸

⁴⁷ During part of this time, February to April 1996, Krokey served as acting union steward while Hearn was out of work, while his grievance concerning the February 6 discharge for failing to report an accident was pending.

⁴⁸ Krokey's grievance did not mention anything about a doctor's appointment or having made prior arrangements with his supervisor to return the freight that he was unable to deliver. (G.C. Exh. 156.) Rather, it states that on the day in question, after being told to "cleanup" his

On August 19, a disciplinary hearing was held on Krokey's overall work record, which revealed that he was disciplined for having a preventable accident on November 14, 1996, costing the Respondent \$763; a preventable accident on January 6, 1997, costing the Respondent \$46; for failing to complete shift on June 4, 1997; and for carelessness resulting in damage to company property and costs of \$313 on July 9.⁴⁹ (R. Exh. 17.) He was suspended for 5-days, but continued to work pending the adjudication of his grievance.

On November 5, 1997, Krokey received a warning letter for unexcused absences. It specified five unexcused absences in the previous 9-month period. On December 8, Krokey had another unexcused absence, which prompted the scheduling of a local disciplinary hearing on January 23, 1998.

In the meantime, the Respondent held its annual east-west bid resulting in several route changes. Krokey's route was changed for 1-week resulting in a loss of overtime.⁵⁰ When Krokey asked his supervisor why his route was changed, he was told it was because he was familiar with the new route. A week later, he was switched to a different route, where he remained for 5-months, without any loss in overtime.

On January 23, the disciplinary hearing concerning Krokey's unexcused absences was held. Krokey explained that the unexcused absences were due to medical appointments for which he had provided a doctor's slip to Supervisor Parulis. Mitchell pointed out that some of the notes were missing and others did not have a diagnosis as required by company policy.⁵¹ Krokey had his doctor fax the required information and as a result no disciplinary action resulted.

In late January 1998, Krokey received a warning letter from a night shift supervisor for failure to meet a delivery time commitment. He testified that he asked Supervisor Parulis to find out what he failed to deliver on time. Krokey testified that Parulis later told him not to worry about it because the delivery was not his responsibility.⁵²

b. The lack of knowledge of protected activity after June 1996

The General Counsel argues that the disciplinary action taken against Krokey on and after April 1, 1997, as noted above, as well as the route changes which occurred in January 1998, were part of a continuing pattern of harassment and retaliation against Krokey because of his former position as alternate union steward and/or because he was a union adherent. There is no evidence, however, that this disciplinary action

resulted from Krokey's prior union activity as an alternate union steward or from any union activity during the relevant time period (April 1, 1997 to January 23, 1998).

Nor is there any evidence that the Respondent mistakenly knew or believed that Krokey, like Hearn, was still engaged in union activity as an ex officio alternate union steward. Krokey testified that after resigning as an alternate union steward, he continued to answer questions for employees and render advice on filing grievances (Tr. 1103). There is no evidence, however, that the Respondent knew that Krokey informally was advising employees or that it suspected him of doing so. Instead, the evidence shows that there was a 9-month gap between the time he resigned (June 1996) and the April 1 warning letter, during which time Krokey was disciplined on several occasions none of which is the subject of any allegation in the complaint. Thus, I find that the General Counsel has failed to show that the Respondent had knowledge of any protected activity by Krokey after June 1996. I further find the General Counsel has failed to show that the Respondent's conduct was unlawfully motivated.

Accordingly, I shall recommend the dismissal of the allegations in paragraphs 8(C)—8(H) of the complaint.

c. The 8(a)(1) violation

The evidence shows that at the end of each daily morning meeting the Respondent permits the union steward 1 minute to make announcements. Krokey testified that at the morning meeting on September 18, 1997, Parulis told the drivers that there would no longer be a question and answer period at the end of the meeting and if there was something that was mentioned in the meeting that they did not like they could file a grievance. Krokey also testified that Parulis told the drivers that if they wanted to speak with a union steward, they would have to do so after their shift or by calling him at home. His testimony is un rebutted.

In light of the breadth of Parulis' statements, I find that they could be interpreted to unlawfully restrict the drivers' access to their union stewards during nonworking time in nonworking areas in violation of their rights protected by Section 7 of the Act.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(L) of the complaint.

H. Alleged Violations Concerning Michael Shuba

1. Facts

Michael Shuba became a driver for the Respondent at the Beachwood facility in July 1991. Although Shuba never held any position with the Union, including union steward or alternate union steward (Tr.788), the evidence shows that he was a union supporter who, over the years, was disciplined by the Respondent for telling casual and part-time drivers not to perform work which he perceived would be in violation of the contract. (R. Exh. 88.)

Shuba also testified that he was an "overseer" (a term he made up) for the Union on the night shift. Because there was no alternate steward on that shift, Shuba would advise Bob Hearn, the union steward, of problems that occurred on the night shift, seek his advice, confer with employees, and help them file grievances. (Tr. 842-843.) Shuba testified that he was

route, he brought back two nondeliverable items at the end of the day. His grievance, therefore, does not corroborate his testimony at the hearing.

⁴⁹ Only the latter incident, which pertained to locking his keys in his truck, is a subject of the allegations of the complaint.

⁵⁰ The evidence shows that between January 16 and February 12, 1998, Krokey was offered overtime work on other routes which he declined. (R. Exh. 85.)

⁵¹ The evidence discloses that the Respondent has a written policy which requires a doctor's slip showing the date, diagnosis, period of absence, doctor's signature, and telephone number. (G.C. Exh. 27 at 25; GC Exh. 26(B) at 3.)

⁵² Neither party had a copy of the letter and therefore it was not introduced into evidence.

not appointed to this informal position by the Union, but simply began doing it in 1994. (Tr. 846–847.)

On December 20, 1996, Shuba filed two grievances as an individual, both of which objected to supervisors performing bargaining unit work. (GC Exhs. 117, 118.) On December 26, 1996, he filed a third grievance alleging that another supervisor had performed bargaining unit work. (GC Exh. 119.)

On January 8, 1997, a company hearing was held to discuss the three grievances, which was attended by Shuba, Union Steward Castro, Business Agent Kovak, DFMS Mitchell, and Kowal. It was determined that the supervisors had performed bargaining unit work and that Shuba was entitled to receive straight time pay for the three grievances totaling \$54.48.

Without prior notice, however, Mitchell brought up Shuba's past overall work record at the hearing and a review of his record resulted in a 5-day suspension. (G.C. Exh. 120.) Shuba grieved the suspension, stating that he was being singled out because he objected to supervisors performing bargaining unit work in derogation of his right as a union member.⁵³ A local disciplinary committee reduced the grievance to a 2-day suspension.

On January 17, 1997, Shuba received a warning letter for allegedly bantering on the two-way radio with other drivers. Someone placed a box containing a dead rat in the truck of a driver, who was not supportive of the Union. Whenever the driver came on the two-way radio, someone yell, "rat, rat, rat." Mitchell testified that after listening to the audio tape of the bantering, he thought it sounded like Shuba, so he authorized the warning letter. Shuba protested the letter and convinced Mitchell that he had not used the radio and that the warning letter should be withdrawn. Mitchell testified that because he was not completely sure that it was Shuba on the two-way radio, he gave him the benefit of the doubt.

On January 27, 1997, Shuba received an another warning letter for allegedly failing to scan a Technicolor pickup. He testified that he made the pick up on the day in question and properly scanned the parcel. After receiving the letter, he complained to Union Steward Castro, which led Mitchell to review the matter. After checking the Company's records, Mitchell determined that the package had been properly scanned and the warning letter was rescinded.⁵⁴

On March 26, 1997, Shuba received another warning letter for abusing his breaktime. Although he admitted taking two 15-minute breaks back-to-back, Shuba testified that he had always done so and had never been disciplined for it. According to Mitchell, the break time policy was in a state of flux, so the written warning was reduced to a verbal warning to remind Shuba that the new policy did not allow breaks to be taken back-to-back. (Tr. 1476.)

On April 1, Shuba received a warning letter for failing to remove all communications from his mailbox. It was the same

letter received on the same day by Jon Krokey. Although Shuba asserted that he checked his box, he conceded that there may have been something mistakenly placed in the box afterwards. (Tr. 837.)

2. Analysis and findings

Paragraph 11 of the complaint alleges that Shuba received the four warning letters in retaliation for filing the grievances over supervisors performing bargaining unit work and in order to discourage him and others from assisting the Union and engaging in protected concerted activity. The Respondent argues that the General Counsel has failed to satisfy her initial evidentiary burden under *Wright Line* because there is no evidence that the Respondent or any of its managers or supervisors knew that Shuba was an "overseer," or that any of the supervisors who issued the warning letter knew that Shuba filed the grievances at the end of December 1996. Whether anyone knew that Shuba was an "overseer" is not significant because the evidence shows that Mitchell was aware that Shuba had filed the grievances about the supervisors performing bargaining unit work. Mitchell also testified that he instructs the supervisors to issue warnings or delegates that responsibility to him. (Tr. 1470.) Thus, the evidence supports a reasonable inference that Mitchell was involved in issuing of the warning letters to Shuba and therefore knowledge of protected activity is present.

The Respondent also argues that there is no evidence of animus with respect to Shuba. That assertion overlooks the evidence showing that at the same hearing to determine the outcome of Shuba's grievances, Mitchell called for a review of Shuba's overall work record and suspended him for 5 days. I find that Mitchell's conduct was in response to the protected concerted activity by Shuba. Although it is not an alleged violation in the complaint, it nevertheless is evidence of animus.

Accordingly, I find that the General Counsel has satisfied her initial *Wright Line* evidentiary burden.

a. The January 17 warning letter

The Respondent's defense with respect to the January 17 warning is basically "no harm, no foul," and therefore no violation. It relies heavily on the fact that Mitchell rescinded the letter after Shuba convinced him that it was not his voice on the tape. It does not explain, however, why Mitchell pinpointed Shuba for discipline in the first place.

In an effort to undercut Shuba's assertion that he was singled out for discipline after he filed the grievances, the Respondent points to his past disciplinary record in an attempt to paint Shuba as a troublesome incredulous employee. However, reliance on past discipline is misplaced because the Respondent has not shown that there, like here, the prior disciplines were immediately preceded by Shuba filing three grievances complaining about supervisors violating the collective-bargaining agreement.

Finally, the Respondent asserts that the disciplinary action was warranted because Shuba inadvertently conceded at the hearing that he put the rat in the box. While that may be true, that's not why he received a warning. He received a warning for allegedly misusing the two-way radio. Because Mitchell conceded that there was no evidence to sustain the warning, it raises a question about why it was issued in the first place.

⁵³ There are no allegations in the complaint concerning this subject.

⁵⁴ Notwithstanding the fact that the January 27 warning letter was rescinded, Shuba filed a grievance on the same day asserting that ever since he filed the grievances protesting the supervisors doing bargaining unit work he has been harassed by management in retaliation for being a union member.

Considering all the evidence taken as a whole, I find that the Respondent's reasons for giving Shuba the January 17 warning letter are pretextual. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 11(A) of the complaint.

b. The January 22 warning letter

The evidence discloses that pickups and deliveries are closely monitored by computer. When a computer report indicated that Shuba failed to properly scan a pickup, Downing issued a warning letter without checking further, which was routine procedure. (R. Exh. 53.) After Shuba complained, a subsequent cross-check of Shuba's driver manifest scan revealed that the computer had erred and therefore the warning was rescinded. Thus, under these circumstances, I find that the discipline was a reaction to a computer report, which would have occurred, even in the absence of his union activity. Accordingly, I shall recommend the dismissal of the allegations of paragraph 11(B) of the complaint.

c. The March 26 warning letter

Mitchell testified that there was a dispute between the Respondent and the Union about how long of a break the drivers were entitled to take and whether those breaks could be taken back-to-back. (Tr. 1473-1476.) According to him, the rules were in a state of flux and the issue was not resolved until late May or early June 1997. (1476, R. Exh. 81 at 16-17.) Notwithstanding the "confusion" about which rule applied, Shuba was given a warning letter. In its brief, the Respondent does not point to, nor did Mitchell identify, any other driver who received a similar warning letter on or before March 26. The Respondent has not offered any explanation for why it chose Shuba to enforce its interpretation of the rules. It did not explain why it waited until after Shuba filed the three grievances to take such action, when the un rebutted evidence shows that he had been taking breaks back-to-back for several years. (Tr. 834, G.C. Exh. 127.) Thus, I find that the Respondent has failed to show that Shuba would have been disciplined, even in the absence of his union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 11(C) of the complaint.

d. The April 1 warning letter

Shuba would not admit that he did not check his mailbox, but conceded that it was possible that a supervisor may have placed something in his box without his knowledge. (Tr. 837.) He, Krokey, and Ineman received similar letters on April 1, and two other drivers received similar letters in May. The evidence supports a reasonable inference that there was a written communication in Shuba's box which prompted the warning. It also shows that other employees received the same discipline for the same offense. Accordingly, I shall recommend the dismissal of the allegations in paragraph 11(D) of the complaint.

I. Alleged violations concerning Wilma Conley

1. Facts

Wilma Conley is employed by the Respondent as a customer service/international agent. She began working at the Middle-

burg Heights terminal in 1993 and transferred to the Beachwood terminal in 1995. On February 6, 1997, Conley became the alternate union steward for the clerical bargaining unit.⁵⁵

In early August 1997, Conley attended a suspension hearing for Customer Service Representative Donna Dennis.⁵⁶ A few days later, she attended a company level hearing for Customer Service Representative Lisa McNamara.

Almost 2 months later, Conley received a warning letter, dated September 26, for failing to properly respond to a problem resolution policy (PRP) message sent to her on Monday, September 22. (GC Exh. 131.) According to Conley, a cue station sent a message on Friday, September 19, asking for an estimated time of delivery for a package.⁵⁷ Conley testified that because agents are not permitted to commit to delivery times, she referred the message to her supervisor. (Tr. 859.) After discussing the matter with Supervisor Joe George, he told her that he would take care of it. Later that afternoon, Conley again reminded George to call the cue station.

The following Monday, George asked Conley if she remembered the shipment. Although he admitted that he forgot to call the station, he told her that in the future she should take care of things like that. He then handed her the warning letter.⁵⁸ Conley did not ask George or anyone else in management why she had been given a written warning. There is no evidence that she grieved the warning.⁵⁹

By certified mail, dated December 5, 1997, Conley received a warning letter stating that on December 3 she failed to process all outbound freight from the office resulting in five service failures. She grieved the written warning stating that a 3-hour power outage, lack of heat, and a malfunctioning alarm system created a distraction. She also pointed out that the Respondent did not provide her with any specific information to verify whether she had made a mistake. (GC Exh. 137.)

Conley received another warning letter, dated December 8, stating that from November 20 through December 2 she failed to update an outbound international shipment resulting in the loss of a major client. (GC Exh. 138.) Although Conley admitted that she had not properly updated the shipment, she attributed the mistake to the fact that she had to work alone because one agent was absent during this time period, and that when she finally found time to work on the shipment 10 days had passed and she realized that she needed a special permit to ship the hazardous material to Saudi Arabia. She did not have the permit, so the freight was not shipped. Conley also conceded that although she tried to update the computer every day, she sometimes forgot. (Tr. 871.) The warning letter also stated that a local disciplinary hearing would be held to consider her exces-

⁵⁵ Par. 12 of the complaint alleges that on and after September 26, 1997, Conley was disciplined for fulfilling her duties as alternate union steward.

⁵⁶ Conley attended a second hearing for Dennis in November 1997.

⁵⁷ George did not testify at the hearing, therefore I credit Conley's un rebutted version of what occurred and when it occurred.

⁵⁸ Although George was directly involved in the incident, the warning letter was signed by Mitchell.

⁵⁹ Because I have granted the Respondent's motion to dismiss the allegations in pars. 12(B) and (C) of the complaint, I have not recited the facts pertaining to them.

sive tardiness and overall work record. Conley filed a grievance protesting the warning.

On December 18, the Respondent issued a written warning to Conley for failing to process an attempted delivery. (R. Exh. at 47.) On December 23, another written warning was issued to her for failing to properly process a domestic shipment. (R. Exh. 72 at 50.) There is no evidence that either of these warnings were grieved and they are not the subject matter of any allegation in the complaint.

On December 31, 1997, Conley filed a grievance stating that Supervisor George was performing bargaining unit work by updating airbills with information needed by the drivers to attempt a delivery. She sought overtime pay of at least 4 hours, stating that she should have been called in to perform this task. (GC Exh. 140.) On the same day, Conley filed another grievance asserting that a casual employee, who was hired on December 1, was permitted to work more than 4 hours a days as provided by the clerical contract and also was permitted to perform nonclerical work. (GC Exh. 141.)

On January 2, 1998, two company hearings were held. One considered Conley's overall work record up to and including December 8, 1997 (GC Exh. 142.), and resulted in a 1-day suspension, which Conley grieved. (GC Exh. 143.) The other considered Conley's work record after December 8, and resulted in a 3-day suspension (GC Exh. 144), which Conley also grieved.

On March 10, Conley received a warning letter from Supervisor George for failing to check the message cue on March 9, prior to leaving for the day. Conley testified that she checked the message cue, but she did not follow the correct procedure because while she was on vacation the Respondent changed the procedure but failed to tell her until after she received the warning.

2. Analysis and findings

The General Counsel generally argues that after Conley became alternate union steward, the Respondent retaliated against her for carrying out her duties as part of a pattern of harassing union stewards. To begin with, there is no evidence of animus toward Conley either before or after September 26, 1997. No antiunion comments or remarks were made to or about Conley as alternate union steward. (Tr. 888-889.) Nor can animus be inferred from the timing of the disciplinary action taken against Conley at any time after she became alternate union steward.

The evidence also shows that immediately after she became alternate union steward Conley attended a company level hearing on February 25, 1997, to consider employee Donna Dennis' overall work record for excessive tardiness, which resulted in a final warning being given to Dennis. (R. Exh. 16 at 37.) There was no disciplinary action taken against Conley following this hearing. Instead, almost 4 months passed before Conley herself received two warning letters on June 24, (R. Exh. 72), neither of which is the subject matter of any allegations this complaint. Thus, I find no evidence showing that between February 6 and September 26, 1997, the Respondent disciplined or sought to discipline Conley for fulfilling her role as alternate union steward.

In addition, the evidence shows that on August 5 Conley attended a company level hearing for Lisa McNamara for overall

work record including tardiness. (R. Exh. 16 at 59.) On August 6, she attended a company level hearing to consider Donna Dennis' overall work record, including excessive tardiness and absenteeism, which resulted in a 3-day suspension. (R. Exh. 16 at 58.) Almost 2 months passed, however, before Conley was disciplined on September 26. Thus, there is no evidence of a nexus between her union activity in early August and her discipline in late September.

Further, there is no evidence showing that Conley did anything other than "attend" the hearings in early August. Conley did not explain what role, if any, she had at these hearings. Nor did she state that her role was different or more aggressive from the first disciplinary hearing she attended on February 27. The evidence does show, however, that Union Business Agent Kovak attended both hearings in August, and the evidence taken as a whole supports a reasonable inference that he was the chief spokesman for the grievants. Thus, there is no evidence that Conley did anything that would prompt the Respondent to react unfavorably to her carrying out her duties as alternate union steward.

The only other disciplinary hearings that Conley "attended" were two suspension hearings for Donna Dennis held on the same day, November 14.⁶⁰ (R. Exh. 17 at 23 and 24.) The evidence shows almost 3-week passed before Conley was disciplined on December 5. I find that the timing of these events does not establish a nexus between Conley's union activity and disciplinary action taken against her.⁶¹

Nor has the General Counsel presented any evidence showing that Conley was treated differently from other customer service agents or that she was treated differently after she became an alternate union steward. Rather, the evidence shows that Conley was disciplined before her tenure as alternative union steward and on occasions during her tenure without any allegations that the discipline was the result of union activity.

Finally, the evidence does not reflect that the warning letters were discriminatorily motivated. With respect to the September 26 letter, the evidence supports a reasonable inference that Supervisor George forgot to return the call. Rather than acknowledge that he made a mistake, he placed the blame on Conley. With respect to the other warning letters, the evidence shows that Conley had made errors and that she previously had been disciplined for making similar mistakes. Thus, I find that the General Counsel has failed to satisfy her initial evidentiary burden.

Accordingly, I shall recommend the dismissal of the allegations in paragraphs 12(A) and (D), and H) of the complaint.

⁶⁰ Contrary to Conley's testimony, the evidence reflects that Conley did not attend the company level hearing for Lisa McNamara on October 21. (R. Exh. 16 at 94.)

⁶¹ Nor do I infer a nexus between the disciplinary hearings on January 2, and the fact that Conley filed two grievances on December 31. Contrary to her assertions that she had no advance warning about the disciplinary hearings, the evidence shows that she was advised in the December 8 warning letter that a local disciplinary hearing would be held. The evidence reflects that it was not the Respondent's practice to specify a date in advance.

J. Alleged Violations Concerning John Mauer

John Mauer has been employed by the Respondent as a driver for 30 years. He began working at the Cleveland Airport terminal, which eventually became the Middleburg Heights terminal.⁶² Mauer was never a union steward or alternate steward and he has never held a union office. Mauer testified that over the years he occasionally complained to management about supervisors performing bargaining unit work. According to Mauer, by late December 1997, it had become a major concern to him. (Tr. 947.)

1. The alleged 8(a)(3) violations

a. The December 30 warning letter

In late December 1997, Mauer observed his supervisor, Robert Culkar, unloading freight from containers. Mauer told him that he should not be unloading the freight because that was bargaining unit work. According to Mauer, Culkar told him to go back to work and file a grievance if he wanted, but that the grievance would be denied. Culkar's recollection of the discussion was essentially consistent with Mauer's testimony. (Tr. 1157.)

Shortly thereafter, Mauer received a warning letter, dated December 30, 1997, for failing on December 26, 1997 to radio the dispatcher before 1 p.m. with the number of packages left on his truck. (G.C. Exh. 148.)⁶³ Although Mauer testified that he could not remember whether he had called in his "numbers" on the day in question, he asserted that it was "no big deal" if he had not done so, because in the past the dispatcher would simply radio the driver to get the information. (Tr. 926-927; GC Exh. 149.)

A few days later, on January 2, 1998, Mauer saw Culkar loading a truck, while another employee, unknown to Mauer, stood by watching. Mauer testified that Culkar told him that he was training the employee, but from Mauer's vantage point Culkar was doing all the work. While Culkar did not recall this specific conversation with Mauer, he testified that he often trains new drivers and in the process of doing so demonstrates how to perform various tasks. Culkar estimated that during the first day of training he performs 90 percent of the work, while the trainee watches, but maintained that it was permissible under the contract. (Tr. 1158-1159.)

b. January 12 route change

Mauer had driven route P-1 route for several years. On January 12, 1998, he was reassigned to route NW-1, which he had never before driven. After he learned of the route change, Mauer asked DFSM David Boozer why he had been assigned a route in a high crime area with less overtime. According to Mauer, Boozer said that it was an administrative move.

Unsatisfied with Boozer's response, Mauer phoned Regional Manager Andrea Parson to complain about the reassignment and to ask for a different route. He also asked Parson if he

could get Culkar to "quit messing with him." Mauer told Boozer that Culkar was always harassing him. Two weeks later, Mauer was reassigned to route MB-1, which he conceded was a more desirable route, but still with less overtime than his original P-1 route. (Tr. 987.)

c. Analysis and findings

The General Counsel argues that even though Mauer was not a union steward or alternate union steward, he nevertheless complained about Culkar performing bargaining unit work and subsequently was given the December 30 warning letter for engaging in concerted union activity. I find that the General Counsel has satisfied her initial evidentiary burden.

The countervailing evidence shows, however, that Mauer failed to call in his numbers before noon as required. His remark that it was "no big deal" is self-serving and unconvincing. It also reflects a lax work attitude, as further reflected by Mauer's past disciplinary record for poor performance. (R. Exh. 89; Tr. 1155.)⁶⁴ Thus, I find that the evidence viewed as a whole shows that the Respondent would have disciplined Mauer even in the absence of his protected concerted activity. Accordingly, I shall recommend the dismissal of the allegation of paragraph 13(A) of the complaint.

Ample evidence also exists that on or about January 1998 the Respondent was concerned about the amount of overtime being worked by the drivers. One of ways that it sought to reduce overtime was by implementing route changes. Mauer and several other drivers had their routes changed on or about January 12. (R. 19.) In addition, several route changes coincided with the east-west bid and a territory transfer, which resulted in a portion of the area serviced by the Middleburg Heights terminal being transferred to the Beachwood terminal. The evidence does not show, however, why Mauer, a driver with 30 years of service, was assigned to a route he had never driven before in a high crime area. I therefore find that the Respondent has failed to show that Mauer would have been reassigned to the less desirable route, even in the absence of his protected concerted union activity. Accordingly, I find that the Respondent violate Section 8(a)(3) of the Act as alleged in paragraph 13(B) and (C) of the complaint.

2. The alleged 8(a)(1) violations

a. The January 22 radio communication

On January 22, while Mauer was delivering his route, Culkar radioed him asking how many deliveries remained to be made. Mauer estimated that he had three to five deliveries. He testified that at that point Culkar ordered him to pull to the side of the road, get out of the van, and count the exact number of stops that were left. In contrast, Culkar testified that Mauer told him that he needed to pull over in order to count the number of remaining deliveries. (Tr. 1154.) Culkar added that Mauer had to pull over almost daily to count his freight. For

⁶² In 1997-1998, David Boozer was the DFSM at the Middleburg Heights terminal.

⁶³ The evidence discloses that all drivers are required to report to the dispatcher by radio before 1 p.m. each day the number of packages on their truck.

⁶⁴ Mauer testified that in the years prior to January 1998, he similarly complained to management about supervisors performing bargaining unit work during the same time period, but inexplicably never filed a charge alleging that he was disciplined because of protected concerted activity.

demeanor reasons, I credit Culkar's account of what occurred. Thus, contrary to the General Counsel's assertion, the evidence does not show that Culkar gave Mauer a demeaning order to harass him because of his protected concerted activity. Accordingly, I shall recommend the dismissal of paragraph 6(N) of the complaint.

b. Debbie Jordan's instructions

Debbie Jordan became Mauer's immediate supervisor on January 12, when he was reassigned to route NW-1. On January 20, she received a fax from Boozer indicating that nine drivers had failed to make express deliveries in a timely manner. Two of the drivers, Mauer and Hancovsky, reported to Jordan. According to Jordan, she cautioned both drivers about not getting their express deliveries completed before noon. She testified that she reviewed with them the "running in route" technique by which a driver simultaneously delivers his express deliveries and "second day service" (SDS) deliveries along his route, until there comes a point in time when he realizes that he must concentrate only on express deliveries in order to get them completed by noon. In contrast, Mauer testified that on January 22, Jordan told him to deliver afternoon freight in the morning, even though he was having difficulty getting his morning freight delivered on time. (Tr. 991.) For demeanor reasons, I credit Jordan's version of the conversation.

Mauer further testified that on the following day, January 23, 1998, Jordan asked him why he had made the afternoon deliveries in the morning without completing the morning deliveries. Mauer told Jordan that he had simply done as she had instructed him to do only the day before. According to Mauer, Jordan did not respond.⁶⁵ Rather, she walked over to Culkar, briefly said something to him, and the two supervisors left the area. (Tr. 940.)

Counsel for the General Counsel contends that Jordan's comments to Mauer on January 23 were intended to harass him because of his protected concerted activity. There is no evidence, however, that Jordan knew that Mauer had complained to Culkar 3 weeks earlier about performing bargaining unit work. In addition, there is no evidence that Jordan said anything to Mauer that constitutes an explicit or implicit threat or which tended to interfere with his Section 7 rights under the Act. Accordingly, I shall recommend the dismissal of paragraph 6(O) of the complaint.

c. The check-ride

The Respondent has a check-ride program to train new drivers and retrain existing drivers. Part of Culkar's job is to check-ride drivers who are in need of retraining. The evidence shows that Mauer had an unusually high number of express delivery failures and a low stops per hour ratio. Culkar testified that out of the 15 drivers he supervised Mauer was the "least best" driver in terms of productivity and service standards. On February 10 and 11, 1998, Culkar accompanied Mauer on his route for a check-ride.

Over a 2-day period, Culkar critiqued various aspects of Mauer's performance. Mauer testified that Culkar told him he

was taking too many bathroom breaks and that he walked too slow to which Mauer explained that he had a bad back and sore ankle. Culkar did not recall discussing bathroom breaks with Mauer nor did he remember whether Mauer gave any explanation for moving slow. Culkar also told Mauer that he should not be taking a 30-minute break. According to Mauer, Culkar told him that if he did not improve his performance he would ride with him until the day he retired.

Mauer was not disciplined in connection with the check-ride. The General Counsel nevertheless argues that the only reason that Culkar rode with Mauer was to harass him because of his protected concerted activity. Contrary to these assertions, the evidence paints a picture of Mauer as a driver with a poor attitude and poor work performance. Culkar credibly testified that Mauer was not receptive to the check-ride and that he told him that he had been driving 30 years and there was nothing that Culkar could show him that he did not already know. I find that the undisputed evidence supports a reasonable inference that Mauer received a check-ride because he was not meeting performance standards. (Tr. 1142-1144, R. 89.) I further find that the Respondent would have disciplined Mauer, even in the absence of his protected concerted activity. Accordingly, I shall recommend dismissal of the allegations in paragraph 6(P) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening to discipline union steward Robert Hearn because he filed grievances and engaged in union activities.

(b) Harassing union steward Robert Hearn by failing to promptly notify him in writing of his discharge because he engaged in union activities.

(c) Harassing union steward Robert Hearn by telephoning his home late at night because he engaged in union activities.

(d) Interrogating alternate unionsteward John Root because he engaged in union activities.

(e) Threatening to discipline alternate union steward John Root because he engaged in union activities.

(f) Publicly ridiculing the Union and ridiculing alternate union steward Jon Krokey because he engaged in union activities.

(g) Prohibiting employees from conferring with their union stewards and alternate union stewards during nonworking time in nonworking areas.

4. The Respondent violated Section 8(a)(3) of the Act by engaging in the following conduct:

(a) Refusing and failing to hire Kevin Tanski as a regular part-time employee on December 15, 1995.

(b) Transferring Union Steward Robert Hearn to more onerous routes, resulting in the loss of overtime, because he engaged in union activities.

(c) Requiring union steward Robert Hearn to complete special assignments because he engaged in union activities.

⁶⁵ Jordan could not recall the specifics of this conversation.

(d) Accelerating the bidding process to limit union steward Robert Hearn's ability to select a route because he engaged in union activities.

(e) Discharging and suspending union steward Robert Hearn in January and February 1996 because he engaged in union activities.

(f) Disciplining employee Robert Hearn because of his past union activities.

(g) Refusing to allow alternate union steward John Root to switch shifts because he engaged in union activities.

(h) Disciplining Alternate union steward John Root because he engaged in union activities.

(i) Reassigning alternate union steward John Root because he engaged in union activities.

(j) Disciplining employee Michael Shuba because he engaged in protected concerted activities.

(k) Transferring John Mauer to a more onerous route, resulting in the loss of overtime, because he engaged in protected concerted activities.

5. The Respondent violated Section 8(a)(4) of the Act by refusing to allow employee Robert Hearn to transfer to another route he filed unfair labor practice charges with the National Labor Relations Board.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practices alleged in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily refused and failed to hire Kevin Tanski as a regular part-time employee on December 15, 1995, the Respondent must offer him employment as a regular full-time driver, if he already has not obtained such a position with the Respondent as a regular part-time driver, and make him whole for any loss of earnings and other benefits that he would have received had he been hired as a regular part-time driver on December 15, 1995, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having discriminatorily discharged employee Robert Hearn in January and February 1996, which discharge was subsequently reduced to a suspension, the Respondent must make him whole for any loss of earnings and other benefits for the period February to July 1996, when he was kept out of work because of discharge and/or the suspension, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co. supra*, plus interest as computed in *New Horizons for the Retarded, supra*.

Having discriminatorily transferred employee, Robert Hearn, to more onerous routes in January to February 1996,

resulting in the loss of overtime, the Respondent must make him whole for any loss of overtime, computed on a quarterly basis from February 15, 1996 to the date of discharge, as prescribed in *F. W. Woolworth Co.*, *supra*, plus interest as computed in *New Horizons for the Retarded, supra*.

Having discriminatorily transferred employee, John Mauer, to a more onerous route on January 12, 1998, resulting in the loss of overtime, the Respondent must make him whole for any lost overtime, computed on a quarterly basis from January 12, 1998 to present, as prescribed in *F.W. Woolworth Co.*, *supra*, plus interest as computed in *New Horizons for the Retarded, supra*.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁶

ORDER

The Respondent, Airborne Freight Corporation, Beechwood and Middleburg Heights, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discipline union stewards and alternate union stewards because they have filed grievances and engaged in union activities.

(b) Harassing union stewards by failing to notify them promptly in writing of their discharges because they engaged in union activities.

(c) Harassing union stewards by telephoning them at home late at night because they engaged in union activities.

(d) Interrogating alternate union stewards because they engaged in union activities.

(e) Publicly ridiculing the Union and publicly ridiculing alternate union stewards because they engaged in union activities.

(f) Prohibiting employees from conferring with their union stewards and alternate union stewards during nonworking time in nonworking areas.

(g) Refusing and failing to hire Kevin Tanski as a regular part-time employee on December 15, 1995.

(h) Transferring union stewards to more onerous routes because they engaged in union activities.

(i) Requiring union stewards to complete special assignments because they engaged in union activities.

(j) Accelerating the bidding process to limit union stewards from selecting routes because they engaged in union activities.

(k) Discharging and suspending union stewards because they engaged in union activities.

(l) Disciplining employees because of their past union activities.

(m) Prohibiting alternate union stewards from switching shifts because they engaged in union activities.

(n) Disciplining union stewards and alternate union stewards because they engaged in union activities.

(o) Reassigning alternate union stewards because they engaged in union activities.

⁶⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(p) Disciplining employees because they engaged in protected concerted activity.

(q) Refusing to allow employees to transfer to other routes because they have filed unfair labor practices charges with the National Labor Relations Board.

(r) Transferring drivers to more onerous routes because they have engaged in protected concerted activity.

(s) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kevin Tanski a position as a regular part, if he has not already assumed such a position, with a seniority date of December 15, 1995.

(b) Make Kevin Tanski, Robert Hearn, and John Mauer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Robert Hearn, John Root, and Michael Shuba and, within 3 days thereafter, notify these employees and former employee in writing that this has been done and that the discipline will not be used against the employees in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its terminals in Beechwood and Middleburg Heights, Ohio, copies of the attached notice marked "Appendix."⁶⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 1999

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge and/or suspend union stewards because they engaged in union activities.

WE WILL NOT discipline employees because of their past union activities.

WE WILL NOT prohibit alternate union stewards from switching shifts.

WE WILL NOT discipline union stewards and alternate union stewards because they have engaged in union activities.

WE WILL NOT refuse or fail to hire job applicants because they belong or support the Teamster Union Local 407 or any other union.

WE WILL NOT threaten to discipline union stewards and alternate union stewards because they have filed grievances and have engaged in union activities.

WE WILL NOT harass union stewards by failing to notify them promptly in writing of their discharges because they have engaged in union activities.

WE WILL NOT harass union stewards by telephoning them at home late at night because they have engaged in union activities.

WE WILL NOT interrogate alternate union stewards because they have engaged in union activities.

WE WILL NOT publicly ridicule Teamster Union Local 407 or publicly ridicule alternate union stewards because they have engaged in union activities.

WE WILL NOT prohibit employees from conferring with their union stewards and alternate union stewards during nonworking time in nonworking areas.

WE WILL NOT transfer union stewards to more onerous routes because they have engaged in union activities.

WE WILL NOT requiring union stewards to complete special assignments because they have engaged in union activities.

WE WILL NOT accelerate the bidding process to limit union stewards from bidding on routes because they have engaged in union activities.

⁶⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT reassign alternate union stewards because they engaged in union activities.

WE WILL NOT discipline employees because they have engaged in protected concerted activity.

WE WILL NOT refuse to allow employees to transfer to other routes because they have filed unfair labor practices charges with the National Labor Relations Board.

WE WILL NOT transfer employees to more onerous routes because they have engaged in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kevin Tanski a position as a regular part-time driver and establish his seniority date as December 15, 1995.

WE WILL make Kevin Tanski, Robert Hearn, and John Mauer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Robert Hearn, John Root, and Michael Shuba, and, within 3 days thereafter, notify these employees and former employees in writing that this has been done and that the discipline will not be used against the employees in any way.

AIRBORNE FREIGHT CORPORATION